

MONTANA LEGISLATIVE HISTORY

BEST COPY
AVAILABLE

Chapter 692 1991

Bill H 1012 S _____ Original bill & history ☒ C

H. Committee on Taxation

Hearing Date(s) Apr 03 ☒ C

_____ C

_____ C

_____ C

Date Out Apr 03 ☒ C

S. Committee on Taxation

Hearing Date(s) Apr 10 ☒ C

Apr 12 ☒ C

_____ C

_____ C

Apr 12 ☒ C

Did this bill originate in an interim committee? ☐ Yes ☐ No

Committee _____

Report _____

4/20 SIGNED BY PRESIDENT
 4/20 TRANSMITTED TO GOVERNOR
 4/24 SIGNED BY GOVERNOR
 CHAPTER NUMBER 615

EFFECTIVE DATE: 7/01/91

HB 1009 INTRODUCED BY PAVLOVICH, ET AL.
 HONORARY CASH BENEFIT FOR VETERANS
 OF OPERATION DESERT STORM

3/23 INTRODUCED
 3/23 REFERRED TO APPROPRIATIONS
 3/23 FIRST READING
 3/23 FISCAL NOTE REQUESTED
 3/27 HEARING
 3/27 TABLED IN COMMITTEE
 3/28 FISCAL NOTE RECEIVED
 4/02 FISCAL NOTE PRINTED

HB 1010 INTRODUCED BY D. BROWN
 ESTABLISH HARD-ROCK MINING IMPACT TRUST RESERVE ACCOUNT

3/23	INTRODUCED		
3/23	REFERRED TO APPROPRIATIONS		
3/23	FIRST READING		
3/23	FISCAL NOTE REQUESTED		
3/26	COMMITTEE REPORT—BILL PASSED		
3/27	FISCAL NOTE PRINTED		
3/27	FISCAL NOTE RECEIVED		
3/28	2ND READING PASSED	92	8
3/28	ON MOTION RULES SUSPENDED TO PLACE ON 3RD		
	READING THIS DAY		
3/28	3RD READING PASSED	93	6
	TRANSMITTED TO SENATE		
3/28	FIRST READING		
3/28	REFERRED TO NATURAL RESOURCES		
4/10	HEARING		
4/11	COMMITTEE REPORT—BILL CONCURRED		
4/13	2ND READING CONCURRED	48	0
4/15	3RD READING CONCURRED	48	0
	RETURNED TO HOUSE		
4/19	SIGNED BY SPEAKER		
4/19	SIGNED BY PRESIDENT		
4/19	TRANSMITTED TO GOVERNOR		
4/24	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 616		

EFFECTIVE DATE: 4/24/91

HB 1011 INTRODUCED BY COHEN, ET AL.
 GENERALLY REVISE PROPERTY TAXATION

3/27 INTRODUCED
 3/27 REFERRED TO TAXATION
 3/27 FIRST READING
 3/27 FISCAL NOTE REQUESTED
 4/03 FISCAL NOTE RECEIVED
 DIED IN COMMITTEE

HB 1012 INTRODUCED BY ELLIOTT
 COLLECT CIGARETTE TAX FROM SALES TO
 NON-INDIANS ON INDIAN RESERVATIONS
 BY REQUEST OF HOUSE TAXATION COMMITTEE

3/27 INTRODUCED
 3/27 REFERRED TO TAXATION
 3/27 FIRST READING

HOUSE FINAL STATUS

HJ 1

3/28	FISCAL NOTE REQUESTED		
4/01	FISCAL NOTE RECEIVED		
4/02	FISCAL NOTE PRINTED		
4/03	HEARING		
4/03	COMMITTEE REPORT—BILL PASSED AS AMENDED		
4/04	2ND READING PASSED	57	40
4/04	ON MOTION RULES SUSPENDED TO PLACE ON 3RD READING THIS DAY		
4/04	3RD READING PASSED	60	39
	TRANSMITTED TO SENATE		
4/05	FIRST READING		
4/05	REFERRED TO TAXATION		
4/10	HEARING		
4/12	COMMITTEE REPORT—BILL CONCURRED AS AMENDED		
4/15	2ND READING CONCURRED	48	0
4/16	3RD READING CONCURRED	46	3
	RETURNED TO HOUSE WITH AMENDMENTS		
4/18	2ND READING AMENDMENTS CONCURRED	51	48
4/19	3RD READING AMENDMENTS CONCURRED	60	38
4/24	SIGNED BY SPEAKER		
4/24	SIGNED BY PRESIDENT		
4/24	TRANSMITTED TO GOVERNOR		
4/27	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 697		

EFFECTIVE DATE: 4/27/91

HB 1013 INTRODUCED BY WHALEN, ET AL

PROHIBIT LIQUOR DIVISION FROM REQUIRING IN-STATE
DISTILLER OR WINERY PRODUCT BAILMENT FOR STATE

4/16	ON MOTION RULES SUSPENDED TO ALLOW LATE INTRODUCTION		
4/17	INTRODUCED		
4/17	REFERRED TO BUSINESS & ECONOMIC DEVELOPMENT		
4/17	FIRST READING		
4/18	HEARING		
4/18	COMMITTEE REPORT—BILL PASSED		
4/19	2ND READING PASSED	97	1
4/19	ON MOTION RULES SUSPENDED TO PLACE ON 3RD READING THIS DAY		
4/19	3RD READING PASSED	97	1
	TRANSMITTED TO SENATE		
4/19	ON MOTION RULES SUSPENDED TO ALLOW FOR LATE INTRODUCTION IN SENATE	49	0
4/20	FIRST READING		
4/20	REFERRED TO BUSINESS & INDUSTRY		
4/22	COMMITTEE REPORT—BILL CONCURRED		
4/23	2ND READING CONCURRED	49	0
4/24	3RD READING CONCURRED	48	0
	RETURNED TO HOUSE		
4/25	SIGNED BY SPEAKER		
4/25	SIGNED BY PRESIDENT		
5/02	TRANSMITTED TO GOVERNOR		
5/16	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 766		

EFFECTIVE DATE: 5/16/91

HJ 1 INTRODUCED BY THOMAS

ASK CONGRESS TO CALL A CONSTITUTIONAL CONVENTION
TO LIMIT ITS TERMS

12/29	INTRODUCED		
12/29	REFERRED TO STATE ADMINISTRATION		
1/07	FIRST READING		
2/01	HEARING		
2/20	TABLED IN COMMITTEE		

HOUSE BILL NO. 1012

INTRODUCED BY ELLIOTT
BY REQUEST OF THE HOUSE TAXATION COMMITTEE

IN THE HOUSE

MARCH 27, 1991 INTRODUCED AND REFERRED TO COMMITTEE
ON TAXATION.

FIRST READING.

APRIL 3, 1991 COMMITTEE RECOMMEND BILL
DO PASS AS AMENDED. REPORT ADOPTED.

APRIL 4, 1991 PRINTING REPORT.

SECOND READING, DO PASS.

ON MOTION, RULES SUSPENDED. BILL
PLACED ON THIRD READING THIS DAY.

THIRD READING, PASSED.
AYES, 60; NOES, 39.

APRIL 5, 1991 ENGROSSING REPORT.

TRANSMITTED TO SENATE.

IN THE SENATE

APRIL 5, 1991 INTRODUCED AND REFERRED TO COMMITTEE
ON TAXATION.

FIRST READING.

APRIL 12, 1991 COMMITTEE RECOMMEND BILL BE
CONCURRED IN AS AMENDED. REPORT
ADOPTED.

APRIL 15, 1991 SECOND READING, CONCURRED IN.

APRIL 16, 1991 THIRD READING, CONCURRED IN.
AYES, 46; NOES, 3.

RETURNED TO HOUSE WITH AMENDMENTS.

IN THE HOUSE

APRIL 18, 1991 RECEIVED FROM SENATE.

SECOND READING, AMENDMENTS
CONCURRED IN.

APRIL 19, 1991

THIRD READING, AMENDMENTS
CONCURRED IN.

SENT TO ENROLLING.

REPORTED CORRECTLY ENROLLED.

1 House BILL NO. 1,012
2 INTRODUCED BY [Signature]
3 BY REQUEST OF THE HOUSE TAXATION COMMITTEE
4
5 A BILL FOR AN ACT ENTITLED: "AN ACT TO APPLY THE CIGARETTE
6 SALES TAX TO ALL USE AND CONSUMPTION OF CIGARETTES ON AN
7 INDIAN RESERVATION EXCEPT BY MEMBERS OF AN INDIAN TRIBE ON
8 AN INDIAN RESERVATION; PROVIDING FOR A REFUND OF OR CREDIT
9 FOR TAXES PAID ON CIGARETTES SOLD TO TRIBAL MEMBERS;
10 REQUIRING A REPORT TO THE 53RD LEGISLATURE; AMENDING SECTION
11 16-11-111, MCA; AND PROVIDING AN EFFECTIVE DATE AND A
12 TERMINATION DATE."
13

14 WHEREAS, the Legislature proposes to eliminate unfair
15 competitive business advantages now enjoyed by retailers
16 operating on Indian reservations in direct competition with
17 businesses operated off the reservations by requiring that
18 cigarettes sold to non-Indian purchasers on an Indian
19 reservation have a Montana cigarette tax stamp affixed even
20 if sold by an Indian retailer; and

21 WHEREAS, the Legislature also recognizes that Indian
22 tribes in Montana also view certain state taxes being
23 assessed against the tribes and tribal members on the
24 reservation, including fuel and alcohol taxes, as being
25 unlawful; and

1 WHEREAS, although the Legislature proposes to exercise
2 its constitutional authority to seek assistance from tribal
3 authorities in collecting cigarette taxes from non-Indians
4 on the reservations, it also recognizes the need for
5 discussion and negotiation with Indian tribes in Montana to
6 avoid dual taxation and to develop a comprehensive
7 resolution of all reservation taxation issues affecting both
8 the state and the tribes.
9

10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

11 NEW SECTION. Section 1. Definitions. As used in
12 [sections 1 through 3], the following definitions apply:

13 (1) "Indian reservation" means Indian lands federally
14 declared to be a reservation for an Indian tribe by treaty
15 between the tribe and any territorial government or state
16 government or the United States government or established by
17 acts of the United States congress or by formal decision of
18 the executive branch of the United States.

19 (2) "Indian retailer" means a business or enterprise
20 that is wholly owned and operated by an Indian tribe in
21 Montana or a business or enterprise that is wholly owned and
22 operated by one or more members of a tribe in Montana on
23 whose reservation the business or enterprise is located.

24 **Section 2.** Section 16-11-111, MCA, is amended to read:

25 "16-11-111. Cigarette sales tax. There-is-hereby (1) A

1 tax on the purchase of cigarettes for consumption, use, or
 2 any purpose other than resale in the regular course of
 3 business is levied, imposed, and assessed at the following
 4 rate and there shall must be collected precollected by the
 5 wholesaler and paid to the state of Montana upon--cigarettes
 6 sold--or--possessed--in--this--state--the--following--excise--tax
 7 which--shall--be--paid--prior--to--the--time--of--sale--and--delivery
 8 of--cigarettes: 18 cents on each package containing 20
 9 cigarettes and, when packages contain more or less than 20
 10 cigarettes, then a tax on each cigarette equal to 1/20th the
 11 tax on a package containing 20 cigarettes.

12 (2) The tax imposed by this section does not apply to
 13 cigarettes sold by an Indian retailer to members of a
 14 federally recognized Indian tribe within the boundaries of
 15 the tribe's reservation located in Montana.

16 (3) The tax imposed by this section must be
 17 precollected, subject to refund or credit as provided in
 18 subsection (4), on all cigarettes entering Montana Indian
 19 reservations.

20 (4) Wholesalers making sales of cigarettes to Indian
 21 retailers may apply to the department for a refund of or
 22 credit for taxes precollected on cigarettes sold by the
 23 retailers to members of an Indian tribe on whose reservation
 24 the retail sale is made. The claim for credit or refund must
 25 be made on the wholesaler's cigarette tax return for the

1 reporting period immediately following the period during
 2 which the cigarettes were sold by the wholesaler to the
 3 retailer. If not claimed, the credit or refund is lost.

4 (5) The total amount of refunds or credits allowed by
 5 the department to all wholesalers claiming the refund or
 6 credit under subsection (4) for any reporting period may not
 7 exceed an amount that is equal to the tax due on the average
 8 individual consumption of cigarettes, determined in a manner
 9 provided by department rule, multiplied by the tribal member
 10 population of the reservation on which the sales are made.
 11 If the total amount of refunds claimed by wholesalers
 12 exceeds the amount computed, the claims by the wholesalers
 13 must be reduced proportionally based on the total amount of
 14 on-reservation business conducted by each wholesaler to the
 15 amounts necessary to make the total of all the claims equal
 16 to the allowable maximum.

17 (6) A refund or credit may not be allowed to a
 18 wholesaler unless the wholesaler certifies to the department
 19 that the economic benefit of the credit or refund has been
 20 passed on to the Indian retailers to whom the sales were
 21 made."

22 **NEW SECTION. Section 3. Revenue oversight -- state and**
 23 **tribal negotiations -- report to legislature. (1) The**
 24 **legislature directs the department of revenue to:**

25 **(a) negotiate with individual tribes within the state**

on the methods of implementing [this act];

(b) discuss and negotiate alternative methods for the collection of cigarette taxes, including the possibility of future tribal taxation, with the tribal governments of each Montana reservation or their designated representatives;

(c) discuss and negotiate with individual Indian tribes in Montana the possibility of resolving other state taxation issues, including but not limited to the imposition of fuel and alcohol taxes on Indian reservations, through state-tribal cooperative agreements; and

(d) report its findings on the collection of cigarette taxes pursuant to 16-11-111 and on negotiations with tribal authorities on a comprehensive state-tribal taxation agreement or proposed legislation to the interim committee on Indian affairs prior to the 53rd legislative session.

(2) The legislature also directs the interim committee on Indian affairs to work with the Montana tribal chairman's association, the state coordinator of Indian affairs, and individual tribes to:

(a) monitor tax collection made pursuant to 16-11-111;

(b) consider alternatives for cigarette tax collection, including possible cooperative agreements to avoid dual taxation by state and tribal governments;

(c) identify other unresolved taxation issues, including but not limited to the imposition of fuel and

alcohol taxes on Indian reservations, between the state and Montana Indian tribes; and

(d) propose legislation to the 53rd legislature that would facilitate a cooperative government-to-government resolution of all Indian reservation taxation issues.

NEW SECTION. Section 4. Codification instruction.

[Section 1] is intended to be codified as an integral part of Title 16, chapter 11, part 1, and the provisions of Title 16, chapter 11, part 1, apply to [section 1].

NEW SECTION. Section 5. Effective date. [This act] is

effective July 1, 1991.

NEW SECTION. Section 6. Termination. [This act]

terminates July 1, 1993.

-End-

STATE OF MONTANA - FISCAL NOTE

Form BD-15

In compliance with a written request, there is hereby submitted a Fiscal Note for HB1012, as introduced.

DESCRIPTION OF PROPOSED LEGISLATION:

An act to apply the cigarette sales tax to all use and consumption of cigarettes on an Indian reservation except by members of an Indian tribe on an Indian reservation; providing for a refund of or credit for taxes paid on cigarettes sold to tribal members; requiring a report to the 53rd legislature; and providing an effective date and a termination date.

ASSUMPTIONS:

1. The effective cigarette tax rate is \$0.1732 per package.
2. Under current law, cigarette tax receipts will be \$11,316,000 in FY92 and \$11,037,000 in FY93 (OBPP).
3. Currently, 28,034,910 packages of cigarettes are being sold annually to Indian reservations in Montana.
4. In 1990, per capita cigarette consumption in the United States was 100.8 packages; in Montana per capita consumption was 84.7 packages (Tobacco Institute).
5. The average annual quota per reservation, under the proposal, will be 90 packages per capita.
6. Total Indian population on reservations in Montana is 30,423 (U.S. Bureau of the Census, 1990).
7. The total number of tax-free packages of cigarettes for all reservations will be 2,738,070 for each year of the biennium.
8. Of the 28,034,910 packages currently being sold to reservations, only 2,738,070 will be sold tax free under the proposal. Of the remaining 25,296,840 packages, it is assumed that 17,280,000 packages are currently being exported out of state. It is assumed that these packages would no longer be purchased or exported. This leaves an increase in taxable packages of 8,016,840.
9. There would be collections for 10 months in FY92 due to inventory reserves leftover from FY91.
10. The potential increase in taxes would be \$1,157,000 in FY92, and \$1,389,000 in FY93.
11. The proposal would require 2.00 FTE (grade 13) field auditors for each year of the biennium at a cost of \$51,672. The operating costs associated with these positions would be \$5,200 in each year of the biennium and equipment costs would be \$7,400 in FY92 only.

FISCAL IMPACT:

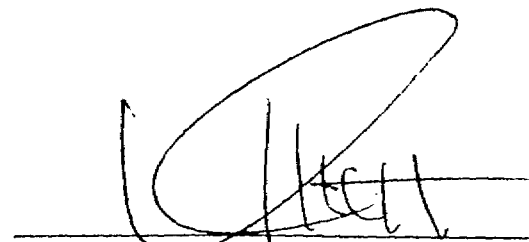
see next page



ROD SUNDSTED, BUDGET DIRECTOR

DATE

Office of Budget and Program Planning



JIM ELLIOFF, PRIMARY SPONSOR

DATE

Fiscal Note for HB1012, as introducedHB 1012-1

FISCAL IMPACT:
Department of Revenue:

	FY '92			FY '93		
	<u>Current Law</u>	<u>Proposed Law</u>	<u>Difference</u>	<u>Current Law</u>	<u>Proposed Law</u>	<u>Difference</u>
<u>Expenditures:</u>						
FTE	0.00	2.00	2.00	0.00	2.00	2.00
Personal Services	0	51,672	51,672	0	51,672	51,672
Operating Costs	0	5,200	5,200	0	5,200	5,200
Equipment Costs	0	7,400	7,400	0	0	0
Total	0	64,272	64,272	0	56,872	56,872
<u>Funding:</u>						
General Fund	0	64,272	64,272	0	56,872	56,872
<u>Revenues:</u>						
Cigarette Tax	11,316,000	12,473,000	1,157,000	11,037,000	12,426,000	1,389,000
<u>Funding Distribution:</u>						
Debt Service (05)	8,022,000	8,842,000	820,000	7,824,000	8,809,000	985,000
Capital Projects (05)	<u>3,294,000</u>	<u>3,631,000</u>	<u>337,000</u>	<u>3,213,000</u>	<u>3,617,000</u>	<u>404,000</u>
Total	11,316,000	12,473,000	1,157,000	11,037,000	12,426,000	1,389,000
Impact to General Fund (decrease)			(64,272)			(56,872)

being a property taxpayer within the county where the center is located. Now, we are state and don't have to worry about what county we live. These are state institutions rather than local institutions. Denis Adams, DOR, said that this was a locally imposed levy. The purpose was so, if you lived in the county where the levy was imposed, you paid a certain amount of tax. This is a provision essentially for out-of-state students and no longer applies.

Closing by Sponsor:

SEN. LYNCH said that the cities that have the centers in them will still have there 1 1/2 mills on them. It is a credit to those communities, that even though they are now state institutions, that the 1 1/2 mills be removed. We are unique in that. No university town has an extra mill because the university is there. Vo-tech have the 1 1/2 mill which is continuing. These centers have the support of the people, and he urged the committee's support.

HEARING ON HB 1012

Presentation and Opening Statement by Sponsor:

REP. ELLIOTT, House District HB 51, Trout Creek, stated HB 1012 provides for the collection of a cigarette tax on cigarettes sold to non-Indians on the reservations. It also calls for a study of state tribal taxation issues in the next two years.

The reason for the collection of the tax is because for some time, tribal smoke shops have taken an unfair competitive advantage over the retailers both on and off the reservations. There is also a serious problem in the purchaser of cigarettes avoiding the state tax. These are not Indians who are subject to the state tax, but are not paying it because they go under the tribal smoke shops law. In 1979, this was not much of an issue when 4% of the state cigarette sales were made on the reservations. In 1990, 29% were made; and the DOR estimates that in 1992, it will be a loss of \$1.157 million and in 1993 \$1.389 million.

Federal law precludes the levying of state taxes on members of a tribe, but state law requires the collection of taxes on non-Indians whether they live on or off the reservations. For many years the legal ambiguity has existed, and has stymied previous efforts by the state to collect the tax. A recent Supreme Court decision declares that states may collect taxes on cigarettes sold to non-Indians and Indian smoke shops on reservations. It seems that the time is right to implement a solution to this problem.

The second issue is the study of the state tribal taxation issues. The time is also correct to address the larger question of state and tribal cooperation on taxation in the area of

cigarettes, gasoline, and alcohol. We need to move forward so that we can get some basic understandings.

The bill provides an immediate affective and applicability date of June 30, 1991. If the bill passes, DOR will have time to go on the reservations and negotiate with the tribes on how they want to administer this act. It provides for a penalty on the possession of untaxed cigarettes in the state, and inter-negotiations on the issues of taxation between the DOR and tribes. It also provides for an interim study involving the House Committee on Indian Affairs and the Montana Tribal Chairman. The bill provides for a sunset in two years in anticipation of negotiated agreements.

Proponents' Testimony:

Jeff Miller, DOR, provided the committee with amendments requested by DOR and graphs to illustrate the problems. EXHIBIT 1,2,3

He stated that DOR sees HB 1012 as essential legislation to allow them to address what has become a problem of serious magnitude. The problem being cigarette tax evasion. Montana's cigarette tax is currently 18 cents per pack. It is a tax on the consumer and is precollected with the help of the 23 licensed wholesalers in the state. The tax applies to all cigarettes possessed in the state by anyone other than an exempted resident. Native Americans and military people on reservations are the only people who are exempt from the tax.

Cigarette tax collections in 1990 amounted to \$12.2 million. HB 1012 addresses "casual smuggling or leakage" of the sales, consumption, and possession of untaxed cigarettes from people who are not exempt from the tax.

The first exhibit highlights the location of Montana's seven Indian Reservations. The second page illustrates the magnitude of sales on taxed and untaxed reservation sales. Under current law, as the result of the 1979 changes, licensed Montana wholesalers may sell unlimited quantities of untaxed cigarettes to reservations. With this change, we see a steady rise in the quantity of cigarettes sold untaxed on the reservations. This is at a time when national and state per capita consumption is dropping. Of the total 9,634,000 cartons sold in Montana, 2.8 million were sold on the reservation tax free. The third and fourth pages give a visual of the distribution of untaxed cigarettes on the reservations. The fifth page is an attempt to quantify what this means is lost revenues to the state.

Mr. Miller referred to the fiscal note. He stated the tax rate on cigarettes is 18 cents a pack. The reason it is an effective tax rate of \$0.1732 is because we allow the wholesaler a stamping allowance to stamp their cigarettes. The fiscal note indicates that they will collect \$1.1 million in the first year of the

biennium. This is reflecting what we anticipate will be some stockpiling in the anticipation of the change.

Amendments 1,2,3, and 4 amend the title to be consistent with the amendments that follow. Amendment 5 makes clear in the body of the law that all cigarettes sold in the state will be stamped. Amendment 6 makes clear that there will be an exemption to Indians. Amendments 7 and 8 coordinate the inner-workings of the bill and require that wholesalers will follow through with certification. Amendment 9 states that the allocation to the Tribes will be on a monthly quota. DOR will establish the quota and recommended distribution of the quota throughout the reservations. There will also be no transfer of quotas between reservations. Amendment 10 clarifies that we will be working on a monthly quota basis. Amendments 11 and 13 delete the mechanism that he just explained. Amendment 12 requires that DOR and the Tribal Councils will revisit the quota on an annual basis. Amendment 14 ties the certification to the exact same departments that are in current law. Amendment 15 will impose a penalty for the possession of untaxed cigarettes. The penalty being \$250 for the first pack and \$10 per pack there after. It is a serious penalty, but it will give people pause before they choose to consume or buy untaxed cigarettes in the state. Amendment 16 amends the current section of law that is inconsistent with the new requirements and provides for a direct appropriation from future cigarette tax revenues. Amendments 17-20 allows the bill to become affective immediately and still be applicable to all cigarettes sold after June 30, 1991.

Mr. Miller stated that HB 1012 is very timely and is a decent mechanism to address this issue. It is working Washington and its administration will be simple. It also helps insure an even application of the existing Montana tax laws relative to the consumption of cigarettes. He urged the committee's support.

Opponents' Testimony:

Eric Kaplan, Attorney, Columbia Falls, provided written testimony. EXHIBIT 4

REP. GERVAIS, Browning, stated the retro-session bill needed to be studied.

Steve Smith, United Truck Lines, stated that every U-haul, Rider truck, or semi-trailer can not be stopped and searched for unstamped cigarettes. The business will still be there for out-of-state wholesalers but not Montana wholesalers. He urged the committee to Do Not Pass HB 1012.

Evelyn Stevenson, Attorney, Flathead Reservation, said that she has been following the Indian cigarette tax issue for 17 years. She relayed the position of the Tribal Council of the Salish-Kootenai Tribe addressing the sale of cigarettes to non-Indians on the reservation. You can not compare that loss of revenue to

other things--they loss of tourism or loss of jobs. The Salish-Kootenai Tribes have not taken action to address the broad spectrum of taxation with the state; but the Tribal Council believes that it is time to sit down and discuss the whole picture. We no longer feel it sufficient to talk about the trade-offs. We have a number of issues that need to be talked about with the state, and will not to go forward in a piecemeal fashion. There are four groups to look in this issue: the consumer, the state, the tribal government, and the business enterprises. We feel that the sunset portion of the bill should be reversed. We should take the next couple of years to sit down and work with the tribes. She suggested to the state that they come up with an arbitration process.

Al Burgess, East-Mont Enterprises, Sidney; Frank Smith, H&S Smoke Shops and Vending; Stan Feist, Sheehan Majestic; Dave Hardin, Missoula; Bob Noble, Missoula; Randy Walton, Ronan; Jay Bennett, Sheehan Majestic; Margaret Hall, Pablo; and Dorothy Clinkenheard, Joe's Smoke Ring; stood in opposition to HB 1012.

Questions From Committee Members:

REP. STANG asked Jeff Miller if the way he explained it, wouldn't it be illegal to have an unstamped pack of cigarettes in the state. Mr. Miller said yes. REP. STANG said that the attorney from the Salish-Kootenai said that they have tried to contact the state for two years to address this problem but have heard no response. He asked Mr. Miller if he knew anything about this. Mr. Miller said that on this particular issue no. There has been a conscious decision on the part of DOR to wait for the Oklahoma Case to wind its way through the Supreme Court process. Now that that is done, and we are trying to do something. REP. STANG said that one of the reasons that the distributors use to oppose a cigarette tax is that if we increase the tax on cigarettes the sales are going to go down and it will result in less money in the long-range building programs. He asked Steve Buckner if this isn't true. Mr. Buckner said yes. REP. STANG asked if it wasn't also true that the more we increase cigarette taxes on the people of the state; the more they drive to the reservations to buy, therefore, that furthers the demise of the long-range building program. Mr. Buckner said that we have used this and we still believe it. This is a problem that needs to be addressed. With the increase in taxes, people will still decide to purchase non-taxed cigarettes, but those cigarettes are going to be coming from out of state and won't affect the state one bit. REP. STANG said he found it amazing that the retailers who reside off the reservation are losing sales, but yet the distributors, don't seem to be worried about the retailer off the reservation as much as you are the ones on the reservation. He feels that if you tax cigarettes on the reservation, you will not lose sales. They will go back to where they were 15 years ago before the big discrepancy happened. The retailers off the reservation who have lost jobs will concurrently hire people back to work that they have laid off in the past few years. Mr. Buckner said that he

does not believe this is so. His company does not deal with reservation cigarettes, and he believes the Indian reservation cigarettes will still flourish if this bill is passed.

Closing by Sponsor:

REP. ELLIOTT said that the 500,000 cigarettes that come into the state that Eric Caplan said would increase. Under HB 1012, those cigarettes would have to have a stamp on them and be taxed. Mr. Caplan stated that the smoke shops wouldn't be able to sell as many cigarettes and base their business on how many cigarettes they can sell. REP. ELLIOTT read the law--16-11-133. The people who are buying these cigarettes and the people who are selling these cigarettes are guilty of a misdemeanor under the code. This is a bad way to base a business decision.

He originally introduced this bill at the beginning of the session which was modeled after SB 440. These bills were not hastily considered. We waited for the Oklahoma case before bringing this bill forward. Mr. Caplan stated that the rebates go to the Indians. The rebates do not go to the Indians, they go to the wholesalers. The issue is not the taxation of Indians, it is the taxation of non-Indians. There will be a loss of sales in the state because there is this existing leakage going out-of-state. He does not believe it is a casual tourist.

REP. GERVAIS said that the retro-session bill needed to be studied. REP. ELLIOTT said that he voted for the retro-session bill because he felt it didn't need a study. Transportation talks about the increase in the transportation of cigarettes and that there will be a huge influx of out-of-state cigarettes. The Federal Contra-band Cigarette Act and Jenkins Act make the inter-state transportation of contra-band cigarette illegal. HB 1012 give the wholesalers a stamping allowance as a rebate of the tax.

REP. ELLIOTT addressed Evalyn Stevenson. He stated that he has been working with Pat Smith, Confederated Salish-Kootenai Tribes. Mr. Smith has known of this coming legislation, and it was just today the he asked for the bill draft request. There is nothing hasty here. Ms. Stevenson may not have had time to digest the amendments, but Mr. Smith has because he received the amendments yesterday.

REP. ELLIOTT closed by saying that two years ago, something needed to be done; four year ago, something needed to be done; and today, something needs to be done. He thinks they ought to do it.

Questions from the Committee:

REP. RANEY asked William Biastock if most people on federal pension have other pension income or social security. Mr. Biastock said some people might, but he does not. REP. RANEY asked if his only income was his retirement. Mr. Biastock said yes and it is currently being tax in California. His wife also has a pension which is taxed. Mrs. Biastock said that if anything should happen to her husband, she will only get 55% of his retirement. All they have is his retirement and the little she gets from working 13 years in California. If she had to pay income tax on her full retirement, she would have very little to live on.

EXECUTIVE ACTION ON HB 1012

Motion: REP. ELLIOTT MOVED HB 1012 DO PASS.

Motion/Vote: REP. ELLIOTT moved to amend HB 1012. Motion carried unanimously. EXHIBIT 10

Motion: CHAIR HARRINGTON MADE A SUBSTITUTE MOTION THAT HB 1012 DO PASS AS AMENDED.

Announcement:

CHAIR HARRINGTON STOPPED THE DISPOSITION OF HB 1012 TO BEGIN THE HEARING ON SB 412.

HEARING ON SB 412

Presentation and Opening Statement by Sponsor:

SEN. CRIPPEN, Senate District 45, Billings, provided written testimony. EXHIBIT 11

Proponents' Testimony:

Denis Adams, DOR, said that when the Montana Supreme Court rules that HB 703 was unconstitutional, it had several option which provided relief for an acceptable solution to the problem. Some of the options were: (1) it could have said that the harm to taxpayers was greater than the inconvenience caused to local governments for redoing their budgets and require that all adjustment be rolled back to the previous year; (2) they could have said that all sales assessment option were illegal and could not be used in the future, but because of the inconvenience to local governments, it could be implemented in 1990; and (3) it could have said that no further adjustments could be made during the current reappraisal cycle unless the state does a complete appraisal of the property. The court did state that the Legislature be given the opportunity to resolve these issues during this session. That is why we are here supporting SB 412. He provided the committee with testimony on the property tax

properties going up and down. CHAIR HARRINGTON said that the reassessment of Great Falls property is very important to them.

Closing by Sponsor:

SEN. CRIPPEN made no closing statement.

EXECUTIVE ACTION ON HB 1012

Discussion:

Disposition of HB 1012 was resumed. CHAIR HARRINGTON REMINDED THE COMMITTEE THAT THE MOTION ON HB 1012 WAS DO PASS AS AMENDED.

Motion: REP. COHEN moved to further amend HB 1012. To amend the Title and Statement of Intent. To strike "section 2" and just have the study left in the bill.

Discussion:

REP. COHEN said that the bill leaves many holes. It seems to him that an out-of-state distributor can haul cigarettes onto the reservation and they can be sold. There is nothing in the bill that would stop this. Jeff Miller said that he does not agree. That would be a violation of the law as this bill is written and a violation of inter-state commerce and federal laws. He thinks that the cigarettes being imported untaxed and unstamped would be subject to the penalties and he does not see that as a hole in the bill.

REP. ELLIOTT spoke against the amendments. It was not his intent to have only a study. That was discussed and they felt that the time was proper and right to get what rightfully belongs to the state. We should go ahead and enter into negotiation and agreement with the Tribes.

Vote: Motion to further amend HB 1012 failed 8 to 12 on a roll call vote. EXHIBIT 14

Vote: Motion that HB 1012 Do Pass As Amended carried 12 to 8 on a roll call vote. EXHIBIT 15

HOUSE OF REPRESENTATIVES

TAXATION COMMITTEE

ROLL CALL

DATE 4/3/91

NAME	PRESENT	ABSENT	EXCUSED
REP. DAN HARRINGTON	✓		
REP. BEN COHEN, VICE-CHAIRMAN	✓		
REP. BOB REAM, VICE-CHAIRMAN	✓		
REP. ED DOLEZAL	✓		
REP. JIM ELLIOTT	✓		
REP. ORVAL ELLISON	✓		
REP. RUSSELL FAGG	✓		
REP. MIKE FOSTER	✓		
REP. BOB GILBERT	✓		
REP. MARIAN HANSON	✓		
REP. DAVID HOFFMAN	✓		
REP. JIM MADISON	✓		
REP. ED MCCAFFREE	✓		
REP. BEA MCCARTHY	✓		
REP. TOM NELSON	✓		
REP. MARK O'KEEFE	✓		
REP. BOB RANEY	✓		
REP. TED SCHYE	✓		
REP. BARRY "SPOOK" STANG	✓		
REP. FRED THOMAS	✓		
REP. DAVE WANZENRIED	✓		

HOUSE STANDING COMMITTEE REPORT

April 3, 1991

Page 1 of 4

Mr. Speaker: We, the committee on Taxation report that House Bill 1012 (first reading copy -- white) do pass as amended .

Signed: _____
Dan Harrington, Chairman

And, that such amendments read:

1. Title, line 5.
Strike: "TO APPLY"
Insert: "APPLYING"

2. Title, line 9.
Following: "MEMBERS;"
Insert: "PROVIDING AN INCREASE IN THE APPROPRIATION TO THE
DEPARTMENT OF REVENUE FOR FISCAL YEARS 1992 AND 1993 TO
ADMINISTER COLLECTION OF CIGARETTE TAXES; PROVIDING A CIVIL
PENALTY FOR THE POSSESSION OF UNSTAMPED CIGARETTES;"

3. Title, line 10.
Following: "AMENDING"
Strike: "SECTION"
Insert: "SECTIONS"

4. Title, line 11.
Following: "16-11-111,"
Insert: "16-11-113, 16-11-119, 16-11-131, AND 16-11-133,"
Following: "AN"
Insert: "IMMEDIATE"
Following: "DATE"
Insert: ", AN APPLICABILITY DATE,"

5. Page 2.
Following: line 23
Insert: "NEW SECTION. Section 2. Stamps affixed on all
cigarettes -- exception. Except for cigarettes sold on
military reservations, all cigarettes sold in Montana must
have a Montana cigarette tax stamp affixed prior to sale."
Renumber: subsequent sections

6. Page 2, line 25.
Following: "tax"
Insert: "-- exemption for sales to Indians"

7. Page 3, line 20.

Following: "(4)"

Strike: "Wholesalers"

Insert: "Pursuant to the procedure provided in subsection (5),
wholesalers"

8. Page 3, line 24 through page 4, line 3.

Following: "made." on line 24

Strike: remainder of line 24 through "retailer." page 4, line 3

9. Page 4.

Following: line 3

Insert: "(5) The distribution of tax-free cigarettes to Indians must be implemented through a system of preapproved, wholesaler shipments. Licensed Montana wholesalers shall contact the department for approval prior to shipment of the untaxed cigarettes. The department may authorize sales based on whether the quota for that particular service area has been met. If the sale is authorized as tax exempt, the wholesaler, upon providing proof of order and delivery to an exempt retailer, must be provided a credit or a refund. Once the allocation for the particular service area has been filled, the department shall immediately notify all wholesalers that all further sales on that reservation must be taxed and that claims for refund or credit will not be honored for the remainder of the month. Allocations are not transferrable between months or between Indian reservations."

Renumber: subsequent subsections

10. Page 4, line 6.

Following: "any"

Strike: "reporting period"

Insert: "month"

11. Page 4, lines 8 and 9.

Following: "cigarettes"

Strike: remainder of line 8 through "rule," on line 9

12. Page 4, line 10.

Following: "made."

Insert: "The department shall determine the amount of refunds or credits for each Indian reservation at the beginning of each fiscal year, using population estimates and other data issued by the United States government."

13. Page 4, lines 11 through 16.

Strike: lines 11 through 16 in their entirety

14. Page 4, line 18.
Following: "department"
Insert: "pursuant to 16-11-132(2)"

15. Page 4, line 22.
Following: line 21
Insert: "NEW SECTION. Section 4. Civil penalty for possession of unstamped cigarettes. In lieu of the criminal penalties provided in Title 16, chapter 11, part 1, the department may assess a person possessing unstamped cigarettes a civil penalty of \$250 for the first full or partial pack of unstamped cigarettes and \$10 for each additional full or partial pack of unstamped cigarettes."
Renumber: subsequent sections

16. Page 6, line 6.
Following: line 5
Insert: "Section 6. Section 16-11-113, MCA, is amended to read:
"16-11-113. Tax insignia. (1) Within 72 hours after receipt by the distributor or dealer of any cigarettes, except as hereinafter provided, he shall cause to be securely affixed thereto the required insignia denoting the tax thereon. ~~A person specifically exempted under the provisions of 16-11-132(2) may not be considered to be acting unlawfully under this section.~~
(2) Said insignia shall be properly canceled prior to sale or removal for consumption, under such regulations as the department may prescribe.
(3) Each package shall have the required insignia to affix thereto in such a manner that the insignia will be destroyed when the package is opened.
(4) Wholesalers and retailers licensed under this part may buy, sell, or have in their possession only cigarettes which have the insignia provided for in this part on each package. The insignia provided for in this part shall be sold to and affixed by licensed wholesalers and licensed retailers only.
(5) Whenever any cigarettes are found in the place of business of any unlicensed wholesaler, retailer, or other person without the insignia affixed and canceled or not marked as having been received by the unlicensed wholesaler, retailer, or person within the preceding 72 hours, the presumption shall be that such cigarettes are kept therein in violation of the provisions of this part."

Section 7. Section 16-11-119, MCA, is amended to read:
16-11-119. Disposition of taxes -- retirement of bonds.
~~All~~ (1) Except as provided in subsection (2), all moneys collected under the provisions of 16-11-111, less the expense of collecting all the taxes levied, imposed, and assessed by said

section, shall be paid to the state treasurer and deposited as follows: 70.89% in the long-range building program fund in the debt service fund type and 29.11% in the long-range building program fund in the capital projects fund type.

(2) The following money, collected pursuant to 16-11-111, is appropriated to the department:

<u>Fiscal year 1992</u>	<u>\$ 64,272</u>
<u>Fiscal year 1993</u>	<u>56,872"</u>

Section 8. Section 16-11-131, MCA, is amended to read:

"16-11-131. Transporting cigarettes without insignia a misdemeanor. It shall be unlawful for any person to transport into, receive, carry, or move from place to place within this state, except in the course of interstate commerce, any cigarettes which do not bear the insignia required by this part, ~~except for a person specifically exempted in 16-11-132(2).~~ Any person violating the provisions of this section is guilty of a misdemeanor and shall be punished as hereinafter provided."

Section 9. Section 16-11-133, MCA, is amended to read:

"16-11-133. Sale and use of cigarettes without insignia unlawful. Every person who sells any package of cigarettes which does not bear the insignia required by this part and every person who uses or consumes a cigarette within this state, taken from a package which does not bear the required insignia, is guilty of a misdemeanor and shall be punished as hereinafter provided, ~~except that a person specifically exempted under the provisions of 16-11-132(2) may not be considered to be acting unlawfully under this section.~~"

Renumber: subsequent sections

17. Page 6, line 7.

Strike: "[Section 1] is"

Insert: "[Sections 1, 2, and 4] are"

18. Page 6, line 10.

Strike: "[section 1]"

Insert: "[sections 1, 2, and 4]"

19. Page 6, line 10.

Following: "date"

Insert: "-- applicability"

20. Page 6, line 11.

Following: "effective"

Strike: "July 1, 1991"

Insert: "on passage and approval and applies to sales made by a wholesaler after June 30, 1991"

Amendments to House Bill No. 1012
First Reading Copy

Requested by the Department of Revenue
For the House Committee on Taxation

Prepared by Eddye McClure
April 1, 1991

1. Title, line 5.
Strike: "TO APPLY"
Insert: "APPLYING"
2. Title, line 9.
Following: "MEMBERS;"
Insert: "PROVIDING AN INCREASE IN THE APPROPRIATION TO THE
DEPARTMENT OF REVENUE FOR FISCAL YEARS 1992 AND 1993 TO
ADMINISTER COLLECTION OF CIGARETTE TAXES; PROVIDING A CIVIL
PENALTY FOR THE POSSESSION OF UNSTAMPED CIGARETTES;"
3. Title, line 10.
Following: "AMENDING"
Strike: "SECTION"
Insert: "SECTIONS"
4. Title, line 11.
Following: "16-11-111,"
Insert: "16-11-113, 16-11-119, 16-11-131, AND 16-11-133,"
Following: "AN"
Insert: "IMMEDIATE"
Following: "DATE"
Insert: ", AN APPLICABILITY DATE,"
5. Page 2.
Following: line 23
Insert: "NEW SECTION. Section 2. Stamps affixed on all
cigarettes -- exception. Except for cigarettes sold on
military reservations, all cigarettes sold in Montana must
have a Montana cigarette tax stamp affixed prior to sale."
Renumber: subsequent sections
6. Page 2, line 25.
Following: "tax"
Insert: "-- exemption for sales to Indians"
7. Page 3, line 20.
Following: "(4)"
Strike: "Wholesalers"
Insert: "Pursuant to the procedure provided in subsection (5),
wholesalers"
8. Page 3, line 24 through page 4, line 3.
Following: "made." on line 24
Strike: remainder of line 24 through "retailer." page 4, line 3

9. Page 4.

Following: line 3

Insert: "(5) The distribution of tax-free cigarettes to Indians must be implemented through a system of preapproved, wholesaler shipments. Licensed Montana wholesalers shall contact the department for approval prior to shipment of the untaxed cigarettes. The department may authorize sales based on whether the quota for that particular service area has been met. If the sale is authorized as tax exempt, the wholesaler, upon providing proof of order and delivery to an exempt retailer, must be provided a credit or a refund. Once the allocation for the particular service area has been filled, the department shall immediately notify all wholesalers that all further sales on that reservation must be taxed and that claims for refund or credit will not be honored for the remainder of the month. Allocations are not transferrable between months or between Indian reservations."

Renumber: subsequent subsections

10. Page 4, line 6.

Following: "any"

Strike: "reporting period"

Insert: "month"

11. Page 4, lines 8 and 9.

Following: "cigarettes"

Strike: remainder of line 8 through "rule." on line 9

12. Page 4, line 10.

Following: "made."

Insert: "The department shall determine the amount of refunds or credits for each Indian reservation at the beginning of each fiscal year, using population estimates and other data issued by the United States government."

13. Page 4, lines 11 through 16.

Strike: lines 11 through 16 in their entirety

14. Page 4, line 18.

Following: "department"

Insert: "pursuant to 16-11-132(2)"

15. Page 4, line 22.

Following: line 21

Insert: "NEW SECTION. Section 4. Civil penalty for possession of unstamped cigarettes. In lieu of the criminal penalties provided in Title 16, chapter 11, part 1, the department may assess a person possessing unstamped cigarettes a civil penalty of \$250 for the first full or partial pack of unstamped cigarettes and \$10 for each additional full or partial pack of unstamped cigarettes."

Renumber: subsequent sections

16. Page 6, line 6.

Following: line 5

Insert: "Section 6. Section 16-11-113, MCA, is amended to read:

"16-11-113. Tax insignia. (1) Within 72 hours after receipt by the distributor or dealer of any cigarettes, except as hereinafter provided, he shall cause to be securely affixed thereto the required insignia denoting the tax thereon. ~~A person specifically exempted under the provisions of 16-11-132(2) may not be considered to be acting unlawfully under this section.~~

(2) Said insignia shall be properly canceled prior to sale or removal for consumption, under such regulations as the department may prescribe.

(3) Each package shall have the required insignia to affix thereto in such a manner that the insignia will be destroyed when the package is opened.

(4) Wholesalers and retailers licensed under this part may buy, sell, or have in their possession only cigarettes which have the insignia provided for in this part on each package. The insignia provided for in this part shall be sold to and affixed by licensed wholesalers and licensed retailers only.

(5) Whenever any cigarettes are found in the place of business of any unlicensed wholesaler, retailer, or other person without the insignia affixed and canceled or not marked as having been received by the unlicensed wholesaler, retailer, or person within the preceding 72 hours, the presumption shall be that such cigarettes are kept therein in violation of the provisions of this part."

Section 7. Section 16-11-119, MCA, is amended to read:

16-11-119. Disposition of taxes -- retirement of bonds.

~~All~~ (1) Except as provided in subsection (2), all moneys collected under the provisions of 16-11-111, less the expense of collecting all the taxes levied, imposed, and assessed by said section, shall be paid to the state treasurer and deposited as follows: 70.89% in the long-range building program fund in the debt service fund type and 29.11% in the long-range building program fund in the capital projects fund type.

(2) The following money, collected pursuant to 16-11-111, is appropriated to the department:

Fiscal year 1992

\$ 64,272

Fiscal year 1993

56,872"

Section 8. Section 16-11-131, MCA, is amended to read:

"16-11-131. Transporting cigarettes without insignia a misdemeanor. It shall be unlawful for any person to transport into, receive, carry, or move from place to place within this state, except in the course of interstate commerce, any cigarettes which do not bear the insignia required by this part, ~~except for a person specifically exempted in 16-11-132(2).~~ Any person violating the provisions of this section is guilty of a misdemeanor and shall be punished as hereinafter provided."

Section 9. Section 16-11-133, MCA, is amended to read:

"16-11-133. Sale and use of cigarettes without insignia

unlawful. Every person who sells any package of cigarettes which does not bear the insignia required by this part and every person who uses or consumes a cigarette within this state, taken from a package which does not bear the required insignia, is guilty of a misdemeanor and shall be punished as hereinafter provided, ~~except that a person specifically exempted under the provisions of 16-11-132(2) may not be considered to be acting unlawfully under this section."~~

Renumber: subsequent sections

17. Page 6, line 7.

Strike: "[Section 1] is"

Insert: "[Sections 1, 2, and 4] are"

18. Page 6, line 10.

Strike: "[section 1]"

Insert: "[sections 1, 2, and 4]"

19. Page 6, line 10.

Following: "date"

Insert: "-- applicability"

20. Page 6, line 11.

Following: "effective"

Strike: "July 1, 1991"

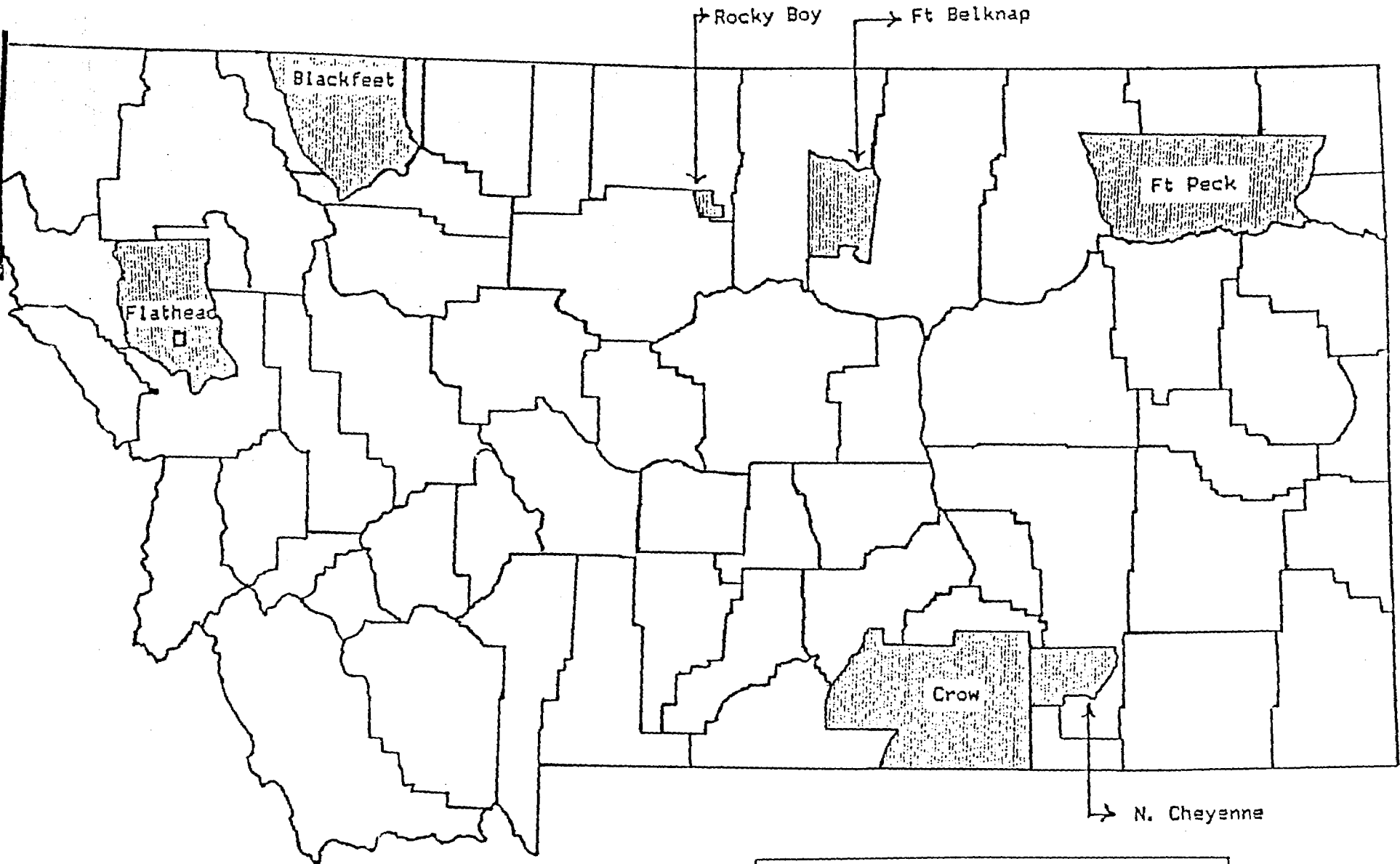
Insert: "on passage and approval and applies to sales made by a wholesaler after June 30, 1991"

EXHIBIT

2

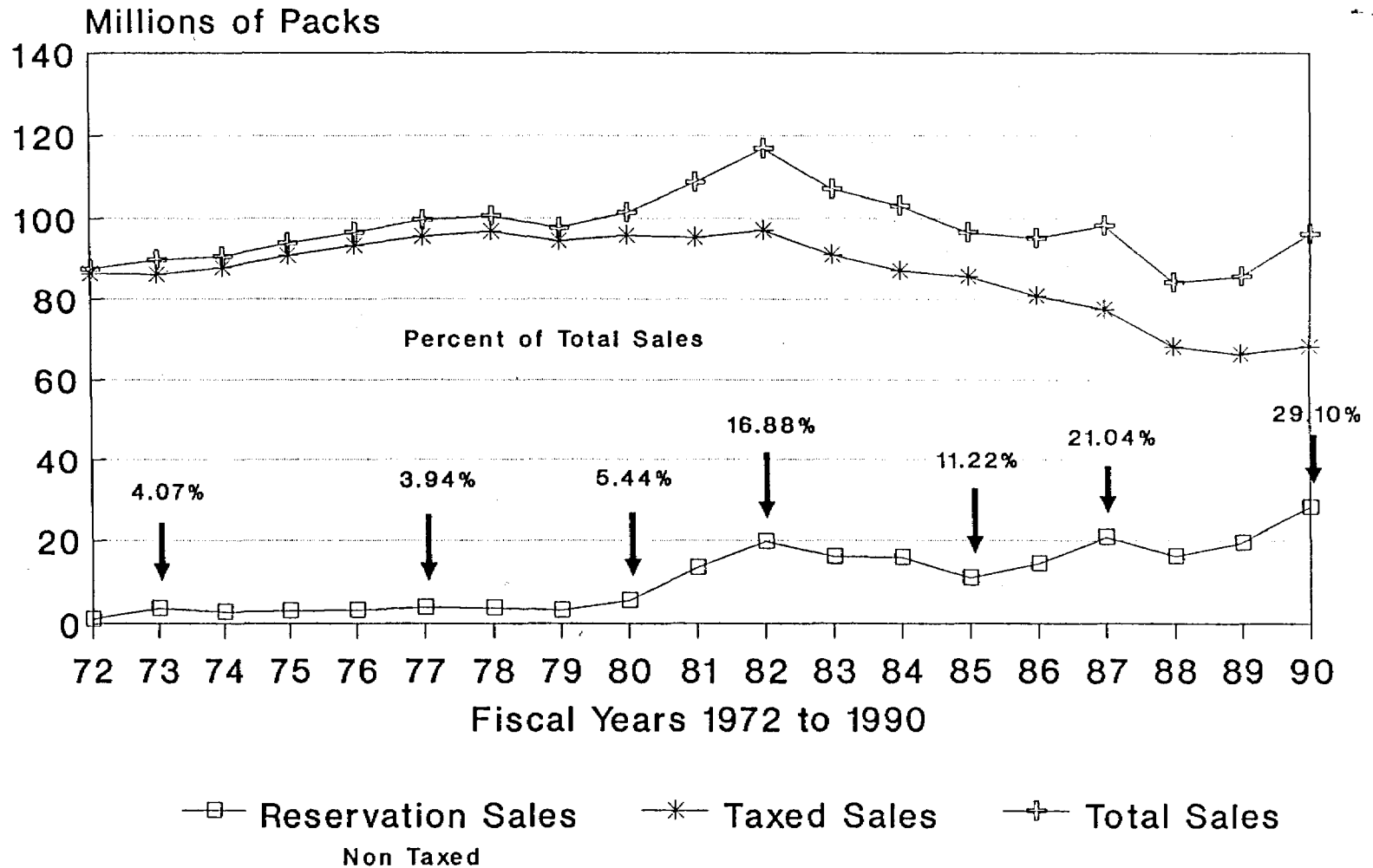
DATE 4-3-91

BY 1012

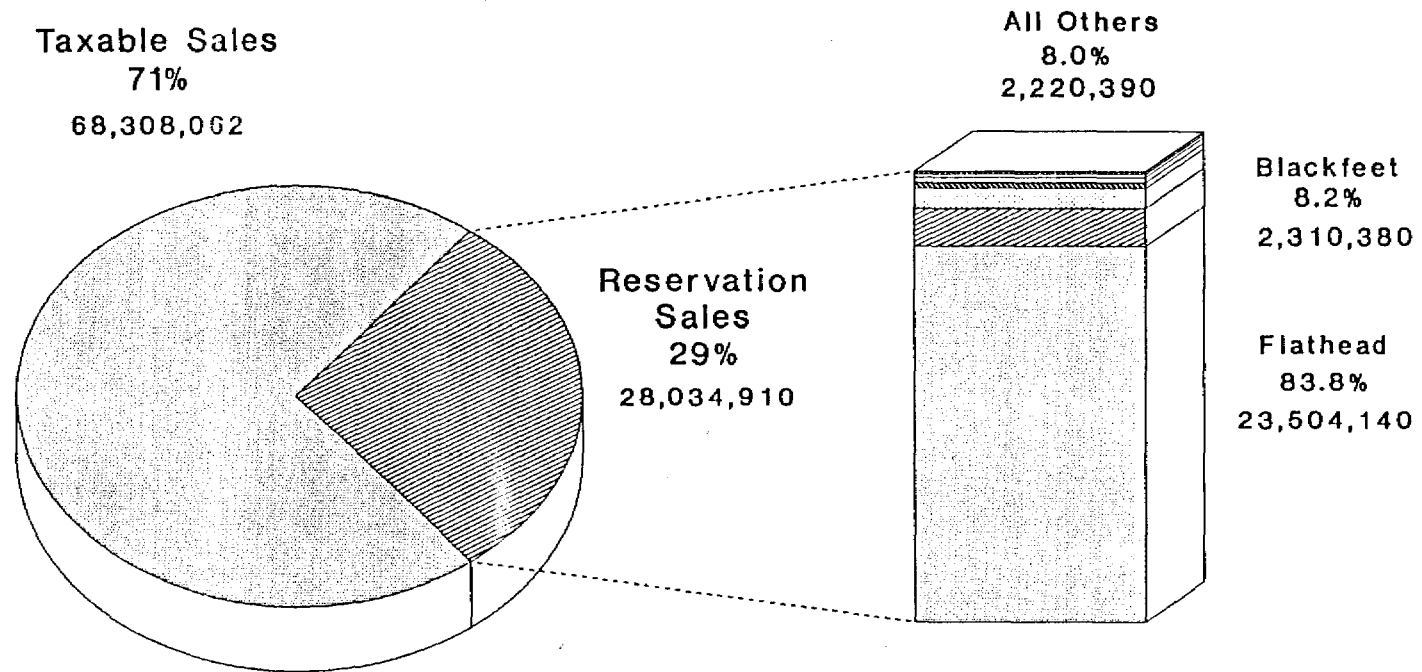


STATE OF MONTANA
INDIAN RESERVATIONS

Total Cigarette Sales Taxed and Untaxed



1990 Distribution of Cigarette Sales Total Packs Sold

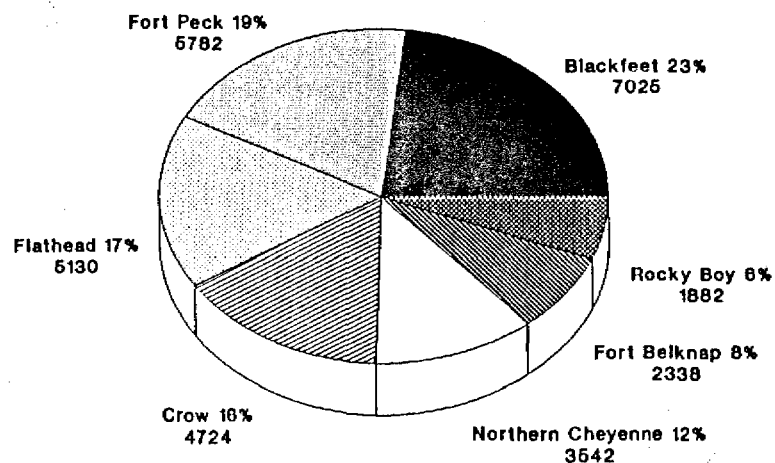


Total Sales
96,343,530

Sales Breakdown To Reservations

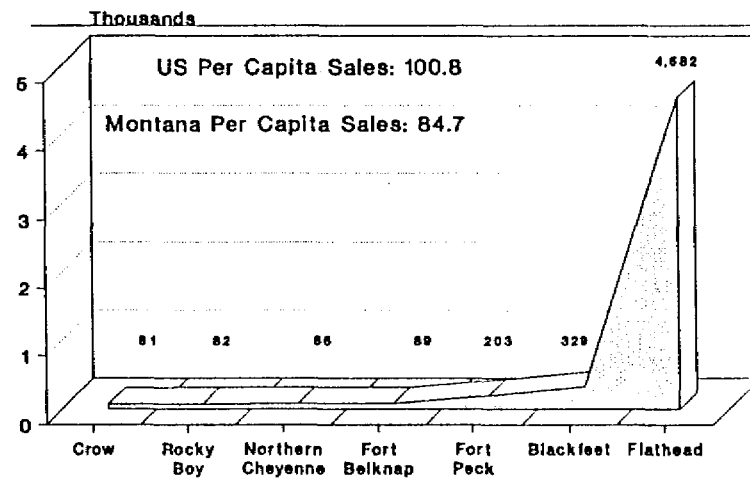
EX. 2 HB 1012
4-3-91

Reservation Population
Source: US Census



3

Reservation Per Capita Consumption
Packages of Cigarettes Per Person



4

4-3-91

Additional Cigarette Tax Collections
Resulting From Per Capita Allocations

FY90 Total Sales To Reservations:	28,034,910
Less - Estimated Out-of-State Exports:	17,280,000
Less - Per Capita Allocation:	2,738,070
Total Additional Taxable Packages:	8,016,840
Effective Tax Rate: 17.3214%	
Additional Cigarette Tax Collections:	\$1,389,000

EXHIBIT 2
DATE 4-3-91
HB 1012

STATE OF MONTANA - FISCAL NOTE

Form BD-15

In compliance with a written request, there is hereby submitted a Fiscal Note for HB1012, as introduced.

EXHIBIT 5
DATE 4-3-91
HB 1012

DESCRIPTION OF PROPOSED LEGISLATION:

An act to apply the cigarette sales tax to all use and consumption of cigarettes on an Indian reservation except by members of an Indian tribe on an Indian reservation; providing for a refund of or credit for taxes paid on cigarettes sold to tribal members; requiring a report to the 53rd legislature; and providing an effective date and a termination date.

ASSUMPTIONS:

1. The effective cigarette tax rate is \$0.1732 per package.
2. Under current law, cigarette tax receipts will be \$11,316,000 in FY92 and \$11,037,000 in FY93 (OBPP).
3. Currently, 28,034,910 packages of cigarettes are being sold annually to Indian reservations in Montana.
4. In 1990, per capita cigarette consumption in the United States was 100.8 packages; in Montana per capita consumption was 84.7 packages (Tobacco Institute).
5. The average annual quota per reservation, under the proposal, will be 90 packages per capita.
6. Total Indian population on reservations in Montana is 30,423 (U.S. Bureau of the Census, 1990).
7. The total number of tax-free packages of cigarettes for all reservations will be 2,738,070 for each year of the biennium.
8. Of the 28,034,910 packages currently being sold to reservations, only 2,738,070 will be sold tax free under the proposal. Of the remaining 25,296,840 packages, it is assumed that 17,280,000 packages are currently being exported out of state. It is assumed that these packages would no longer be purchased or exported. This leaves an increase in taxable packages of 8,016,840.
9. There would be collections for 10 months in FY92 due to inventory reserves leftover from FY91.
10. The potential increase in taxes would be \$1,157,000 in FY92, and \$1,389,000 in FY93.
11. The proposal would require 2.00 FTE (grade 13) field auditors for each year of the biennium at a cost of \$51,672. The operating costs associated with these positions would be \$5,200 in each year of the biennium and equipment costs would be \$7,400 in FY92 only.

FISCAL IMPACT:

see next page

NOT FOR
DISTRIBUTION


ROD SUNDSTED, BUDGET DIRECTOR

4-1-91
DATE

JIM ELLIOTT, PRIMARY SPONSOR

DATE

Office of Budget and Program Planning

FISCAL IMPACT:Department of Revenue:

	FY '92			FY '93		
<u>Expenditures:</u>	<u>Current Law</u>	<u>Proposed Law</u>	<u>Difference</u>	<u>Current Law</u>	<u>Proposed Law</u>	<u>Difference</u>
FTE	0.00	2.00	2.00	0.00	2.00	2.00
Personal Services	0	51,672	51,672	0	51,672	51,672
Operating Costs	0	5,200	5,200	0	5,200	5,200
Equipment Costs	0	7,400	7,400	0	0	0
Total	0	64,272	64,272	0	56,872	56,872
<u>Funding:</u>						
General Fund	0	64,272	64,272	0	56,872	56,872
<u>Revenues:</u>						
Cigarette Tax	11,316,000	12,473,000	1,157,000	11,037,000	12,426,000	1,389,000
<u>Funding Distribution:</u>						
Debt Service (05)	8,022,000	8,842,000	820,000	7,824,000	8,809,000	985,000
Capital Projects (05)	3,294,000	3,631,000	337,000	3,213,000	3,617,000	404,000
Total	11,316,000	12,473,000	1,157,000	11,037,000	12,426,000	1,389,000
Impact to General Fund (decrease)			(64,272)			(56,872)

TESTIMONY OF ERIC F. KAPLAN, ATTORNEY
BEFORE THE HOUSE TAXATION COMMITTEE
ON APRIL 3, 1991
REGARDING HOUSE BILL 1012

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE: MY NAME IS ERIC KAPLAN. I AM AN ATTORNEY IN COLUMBIA FALLS. PRIOR TO MOVING TO MONTANA 6 YEARS AGO, I WAS AN ATTORNEY WITH THE U.S. DEPARTMENT OF JUSTICE IN WASHINGTON, D.C. FOR 12 YEARS. I HAVE SPENT CONSIDERABLE TIME ANALYZING HB 1012. I HAVE RESEARCHED THE RELEVANT LAW, TALKED WITH MEMBERS OF SEVERAL TRIBES, REVIEWED STATISTICS AND HAVE DISCUSSED THE BILL WITH AN OFFICIAL OF THE DEPARTMENT OF REVENUE. I AM HERE TODAY ON BEHALF OF SEVERAL SMOKE-SHOP OWNERS AND WHOLESALERS WHO OPPOSE HB 1012.

I WISH TO MAKE FOUR POINTS IN OPPOSITION TO THIS BILL. FIRST, THE BILL WILL HAVE ADVERSE EFFECTS ON SEGMENTS OF THE MONTANA ECONOMY. SECOND, THE BILL RAISES AS MANY QUESTIONS AND UNCERTAINTIES AS IT SEEKS TO ADDRESS. THIRD, IT IS HIGHLY UNLIKELY THE BILL WILL RAISE ANY MONEY FOR THE STATE OF MONTANA AND WILL LIKELY COST THE STATE REVENUE. FINALLY, AS THE BILL ITSELF POINTS OUT, NEGOTIATION IS PREFERABLE SO THAT ALL INVOLVED PARTIES COME OUT AHEAD.

IF THIS BILL PASSES, ONE OF TWO VERY UNDESIRABLE SCENARIOS WILL DEFINITELY OCCUR, BOTH OF WHICH WILL HAVE NEGATIVE EFFECTS ON PORTIONS OF MONTANA'S ECONOMY. UNDER THE FIRST, IN-STATE SMOKE-SHOPS WILL SIMPLY OBTAIN THEIR CIGARETTES FROM OUT-OF-STATE. ACCORDING TO THE DEPARTMENT OF REVENUE, APPROXIMATELY 500,000 CARTONS OF UNTAXED CIGARETTES CAME INTO MONTANA LAST YEAR FROM OUT-OF-STATE. IF THIS BILL PASSES, THESE SHIPMENTS WILL CERTAINLY INCREASE AND MONTANA WHOLESALERS WILL SUFFER SIGNIFICANT LOSSES. IN FACT, THE AMENDMENTS TO THE BILL SEEM TO EXPRESSLY EXEMPT INTERSTATE SHIPMENTS FROM THE TAXING REQUIREMENTS.

THE ALTERNATE SCENARIO WILL ARISE IF THOSE SHIPMENTS ARE STOPPED, IN WHICH CASE NOT ONLY WILL THE WHOLESALERS SUFFER BUT ALSO THE MANY MONTANA SMOKE-SHOP OWNERS AND THEIR EMPLOYEES. OBVIOUSLY, THEY WILL NO LONGER BE ABLE TO SELL NEARLY AS MANY CIGARETTES AS THEY DO NOW, WHICH WILL LEAD TO LESS EMPLOYMENT, AND LESS TAXES FOR THE STATE. ONE OR THE OTHER OF THESE VERY UNDESIRABLE OUTCOMES WILL DEFINITELY TAKE PLACE IF HB 1012 BECOMES LAW.

IN ADDITION TO THESE LOST CIGARETTE SALES, SALES OF ADDITIONAL MERCHANDISE THAT IS FREQUENTLY SOLD TO TOURISTS WHO STOP TO PURCHASE TAX-FREE CIGARETTES WOULD ALSO BE LOST. THESE ITEMS INCLUDE GASOLINE, FOOD AND BEVERAGES, SOUVENIRS, AND RELATED ITEMS. THE AMOUNT OF THESE LOST SALES IS LIKELY TO BE CONSIDERABLE.

THE SECOND POINT I WISH TO MAKE IS THAT THE BILL CONTAINS A GREAT MANY AMBIGUITIES AND UNCERTAINTIES. THIS IS NOT SURPRISING IN LIGHT OF THE FACT THAT THIS BILL, WHICH DEALS WITH A VERY COMPLEX SUBJECT, WAS DRAFTED VERY QUICKLY TO MEET THE TRANSMITTAL DEADLINE. INDEED, YESTERDAY AFTERNOON I RECEIVED 4 PAGES OF AMENDMENTS, WHICH IS LONGER THAN THE SUBSTANTIVE PORTIONS OF THE BILL ITSELF. THE BILL IS STILL VERY UNCLEAR. FOR EXAMPLE, THE BILL DOES NOT SPECIFICALLY ADDRESS THE QUESTION OF OUT-OF-STATE SHIPMENTS INTO MONTANA, ALTHOUGH IT SUGGESTS THAT THEY ARE EXEMPT. ALSO, IT IS UNCLEAR WHETHER OR NOT THE RETAILER IS EXPECTED TO CHARGE THE TAX TO THE INDIAN PURCHASER OR NOT. SEVERAL SECTIONS OF THE BILL ARE INCONSISTENT ON THIS POINT. IF HE IS SUPPOSED TO CHARGE THE TAX, NOT ONLY IS THIS ILLEGAL, IT WILL RESULT IN AN ADMINISTRATIVE NIGHTMARE IF THOUSANDS OF INDIVIDUALS MUST BE LOCATED IN ORDER TO FORWARD A TAX REBATE. IF THE RETAILER IS NOT SUPPOSED TO COLLECT THE TAX, THEN HE APPARENTLY MUST "FRONT" OR "LOAN" THE TAX MONEY TO THE STATE BECAUSE HE IS REQUIRED TO PAY IT TO THE WHOLESALER, BUT HE WILL NOT BE ALLOWED TO OBTAIN IT FROM THE CONSUMER. THE BILL DOES NOT DISCUSS HOW OR WHEN THIS MONEY WILL BE REFUNDED TO THE RETAILER.

ADDITIONALLY, THE BILL WILL CREATE A GREAT DEAL OF CONFUSION AND UNCERTAINTY FOR THE RETAILERS. FOR EXAMPLE, THE RETAILER WILL NOT EVEN KNOW IF HIS ORDER WILL BE ALLOWED WHEN HE PLACES IT AND WILL HAVE DIFFICULTY IN MANAGING HIS INVENTORY AND BUSINESS. SIMILARLY, THE SCHEME THAT THE BILL ENVISIONS WILL LIKELY CAUSE THE RETAILERS TO CALL AND MAKE ORDERS ON THE FIRST DAY OF EACH MONTH IN AS LARGE A QUANTITY AS POSSIBLE IN ORDER TO OBTAIN THE TOTAL "SERVICE AREA" QUOTA. PRESUMABLY, THEY WILL PLACE LARGE ORDERS BECAUSE THE BILL DOES NOT IMPOSE ANY TIME LIMIT UPON THEM IN WHICH TO SELL THESE TAX-FREE CIGARETTES. THE BILL REFERS TO SUCH CONCEPTS AS "SERVICE AREA" AND "EXEMPT RETAILERS", BUT DOES NOT DEFINE OR EXPLAIN THEM. THE BILL SAYS THE DEPARTMENT "MAY" AUTHORIZE SALES BASED ON THE QUOTA, APPARENTLY GIVING THE DEPARTMENT THE DISCRETION TO REFUSE TO AUTHORIZE SALE. ON WHAT

1
[GROUND MAY THE DEPARTMENT REFUSE TO AUTHORIZE SALES?

THE BILL ATTEMPTS TO ERECT AN ELABORATE SYSTEM OF TAX-FREE COLLECTIONS AND REBATES BUT LEAVES MANY QUESTIONS UNANSWERED. IF THE WHOLESALER COLLECTS THE TAX UPON DELIVERY TO THE RETAILERS, DOES THIS MEAN THE RETAILER HAS TO ADVANCE THE MONEY EVEN IF THE SALES WILL BE TAX-FREE? HOW QUICKLY WILL THE WHOLESALER BE REIMBURSED? SIMILARLY, HOW AND WHEN WILL THE RETAILER BE REIMBURSED?

A MAJOR COMPONENT OF THE BILL IS A FORMULA WHICH WILL BE DEVELOPED TO DETERMINE HOW MANY TAX-FREE CIGARETTES CAN BE SOLD. HOWEVER, THE ENTIRE QUESTION OF DETERMINING HOW THAT FORMULA IS DERIVED IS LEFT TO THE DEPARTMENT OF REVENUE, WHICH IS AN EXTREMELY BROAD AND UNCERTAIN DELEGATION OF AUTHORITY.

IN ADDITION TO THESE ADMINISTRATIVE AND INTERPRETIVE PROBLEMS, THE BILL RAISES SERIOUS CONSTITUTIONAL QUESTIONS. WHILE THE SUPREME COURT HAS SAID THAT, UNDER CERTAIN CIRCUMSTANCES, A STATE MAY TAX SALES BY INDIANS TO NON-INDIANS, THE COURT HAS EXPRESSLY STATED THAT THE STATE CAN ONLY DO SO ONLY IF IT IMPOSES "MINIMAL BURDENS" ON THE PARTIES.

I AM AWARE OF THE RECENT POTAWATOMI DECISION OF THE UNITED STATES SUPREME COURT. HOWEVER, THAT CASE HAS LITTLE RELEVANCE TO THE ISSUES AT HAND. THAT CASE DEALT WITH SALES OF CIGARETTES BY A TRIBE, NOT INDIVIDUAL SMOKE-SHOPS. ALTHOUGH IT IS TRUE THAT THIS CASE REAFFIRMED THE RULE THAT STATES MAY TAX INDIAN SALES TO NON-INDIANS, IT ALSO REAFFIRMED THE COLVILLE AND MOE CASES WHICH HAVE MADE IT CLEAR THAT THE STATE CAN ONLY DO SO IF IT ENACTS CONSTITUTIONAL LEGISLATION. INDEED, NEITHER THE COURT IN POTAWATOMI NOR IN ANY OTHER DECISION HAS EVER CONSIDERED A SCHEME SIMILAR TO THE ONE BEING PROPOSED HERE. IN FACT, IN BOTH MOE AND COLVILLE THE SCHEME UNDER CONSIDERATION SIMPLY INVOLVED THE INDIAN RETAILER CHARGING THE TAX TO NON-INDIANS AND NOT CHARGING IT TO INDIANS. THERE WERE NO QUOTAS, FORMULAS, ALLOTMENTS, REBATES, OR OTHER PROVISIONS SUCH AS WE HAVE HERE.

APPROXIMATELY FOUR MONTHS AGO, HOWEVER, THE NEW YORK SUPREME COURT, BASED ON DECISIONS OF THE U.S. SUPREME COURT AND DECISIONS OF NEW YORK'S HIGHEST COURT, STRUCK DOWN AS UNCONSTITUTIONAL AN INDIAN CIGARETTE TAX THAT APPEARS TO BE IDENTICAL TO HB 1012. THE COURT FOUND THAT THE REQUIREMENTS PLACED BY THE LAW ON THE WHOLESALERS WAS UNCONSTITUTIONAL. A COPY OF THAT

DECISION IS ATTACHED HERETO.

THE THIRD POINT I WISH TO MAKE IS THAT THIS BILL WILL NOT RAISE ANY SIGNIFICANT REVENUES FOR THE STATE. THE VAST MAJORITY OF SALES THAT ARE NOW MADE ON THE RESERVATIONS ARE ONLY MADE BECAUSE THEY ARE TAX-FREE. THOSE SALES WILL NOT BE MADE IF THEY ARE TAXED. FOR EXAMPLE, TOURISTS DRIVING THROUGH MONTANA WILL HAVE ABSOLUTELY NO INCENTIVE TO BUY SIGNIFICANT QUANTITIES OF CIGARETTES IF THEY ARE NOT TAX-FREE. ATTACHED HERETO ARE TWO CHARTS WHICH SHOW THE SALES THAT WILL BE LOST IF THIS BILL PASSES. THESE CHARTS USE DIFFERENT STATISTICS AND METHODOLOGY, BUT BOTH SHOW THAT APPROXIMATELY 1.7 MILLION LESS CARTONS OF CIGARETTES WILL BE SOLD IN MONTANA IF THIS BILL PASSES. NOT ONLY WILL THIS HAVE A VERY ADVERSE EFFECT ON THE ECONOMY, AS DISCUSSED ABOVE, IT ALSO MEANS THE STATE IS NOT LIKELY TO GENERATE SIGNIFICANT ADDITIONAL REVENUE AS A RESULT OF THIS BILL. SIMPLY STATED, THE HYPOTHETICAL SALES FROM WHICH THAT REVENUE MIGHT BE GENERATED WILL NOT TAKE PLACE.

THE FINAL POINT I WISH TO MAKE IS THAT A NEGOTIATED APPROACH TO THIS ISSUE IS PREFERABLE TO THIS HASTILY-DRAFTED BILL. INDEED, THE BILL ITSELF IN SEVERAL PLACES MAKES THAT VERY POINT. IN SECTION 3(b), THE PARTIES ARE DIRECTED TO "DISCUSS AND NEGOTIATE ALTERNATIVES FOR THE COLLECTION OF CIGARETTE TAXES". IT DOES NOT SEEM PRUDENT TO GAMBLE WITH THE FUTURE OF A LARGE NUMBER OF MONTANA'S BUSINESSES, THEIR EMPLOYEES AND THEIR FAMILIES WHILE THE PARTIES ARE NEGOTIATING ALTERNATIVE METHODS. THE MORE SENSIBLE APPROACH WOULD BE NOT TO TAKE THAT GAMBLE, BUT INSTEAD TO DIRECT THE PARTIES TO NEGOTIATE AND ARRIVE AT A PROPOSAL PRIOR TO THE NEXT LEGISLATURE.

IN CONCLUSION, WE BELIEVE STRONGLY THAT THE BILL SHOULD NOT PASS, THAT IT IS NOT IN THE INTEREST OF THE CITIZENS OF THIS STATE AND THAT IT WILL HAVE SERIOUS ECONOMIC CONSEQUENCES ON THE PEOPLE OF MONTANA. THANK YOU FOR YOUR CONSIDERATION.

EXHIBIT 4
DATE 4-3-91
HB 1012

SUPPLY AND DEMAND OF TAXED CIGARETTES

MONTANA'S NON-INDIAN POPULATION	760,000
AVERAGE MONTANA CIGARETTE CONSUMPTION (D.O.R. FIGURES)	84.7
TOTAL NON-INDIAN CIGARETTE CONSUMPTION (IN CARTONS)	6,437,200
TOTAL TAXED CARTONS SOLD	6,533,487

CIGARETTE SALES THAT WILL BE LOST UNDER HOUSE BILL 1012

(BASED ON 1987 DEPARTMENT OF REVENUE STATISTICS)

Total cigarettes sold on Montana Reservations	2,067,162 cartons
Total cigarettes sold for Indian consumption	344,774 cartons
Sales that will be lost under House Bill 1012	1,722,388 cartons

CIGARETTE SALES THAT WILL BE LOST UNDER HOUSE BILL 1012

Total Indians in Montana (1990 census)	47,679
Total Indians that smoke (Based on national average of 25%)	11,920
Total annual cigarette sales to Indians (Based on national average of one carton per week)	619,840 cartons
Actual cartons shipped to Reservation (1990 Department of Revenue statistics)	2,317,568 cartons
Sales that will be lost under House Bill 1012	1,697,728 cartons

Exhibit # 4
4-3-91 HB 1012

NEW YORK SUPREME COURT—
APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

MILHELM ATTEA & BROTHERS, INC. v.
DEPT. OF TAXATION & FINANCE OF THE
STATE OF NEW YORK, et al.

No. 60199 (N.Y. Sup. Ct., App. Div., Dec. 6, 1990)

Summary

Plaintiffs, wholesale dealers of cigarettes, challenge cigarette sales tax regulations promulgated by the state of New York which: (1) allow wholesalers to purchase, tax free, a quantity of cigarettes determined by the State Department of Taxation and Finance to be the amount needed to supply the personal needs of Indian consumers, (2) impose record-keeping requirements on wholesalers, and (3) may require applications for refunds for exempt sales upon which tax was prepaid; and seek a declaratory judgment that the regulations are invalid and an injunction against their enforcement. The court granted plaintiffs' motion for a preliminary injunction restraining enforcement of the regulations and plaintiffs' motions for summary judgment. Defendants appealed.

Citing its reasoning in *Herzog Bros. Trucking v. State Tax Commission*, 69 N.Y.2d 536, and again considered (72 N.Y.2d 720) upon remand from the U.S. Supreme Court (*State Tax Comm'n of State of New York v. Herzog Bros. Trucking*, 487 U.S. 1212), the court of appeals affirms the grant of plaintiffs' motion for summary judgment.

Full Text

Before WEISS, Presiding Justice, and MIKOLL, LEVINE,
MERCURE and HARVEY, Associates Justices

MIKOLL, Associate Justice

Plaintiff in action no. 1, Milhelm Attea & Brothers, Inc. (hereinafter Attea Brothers), a wholesale dealer of cigarettes licensed under Tax Law § 480, is a New York corporation with its principal place of business in Erie County. Almost 75 percent of its sales are to Indians on Indian reservations in New York. Plaintiff in action no. 2, Elias H. Attea, Jr., also sells cigarettes wholesale to Indians on Indian reservations in New York.

The Tax Law imposes a cigarette tax on all cigarettes possessed in this state for sale "except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax" (Tax Law § 471[1]). Sales of cigarettes on Indian reservations to Indians for personal consumption are exempt from state taxation (20 NYCRR 335.5[2]). Pursuant to regulations applicable to sales made after January 1, 1989, a tax is imposed on cigarettes sold at wholesale to Indians on Indian reservations for retail sale to non-Indians (see 20 NYCRR 331.4, 331.5, 331.6, 331.7, 331.8, 331.9, 331.10, 335.5). Wholesalers may purchase, tax free, a quantity of cigarettes determined by defendant Department of Taxation and Finance (hereinafter the Department) to be the amount needed to supply the personal needs of the Indian consumers (20 NYCRR 335.5). Thus, the quantity of tax-free cigarettes which may be sold by the wholesalers is limited (20 NYCRR 335.5[e]). Further, record-keeping requirements are imposed on the wholesalers (see, e.g., 20 NYCRR 337.3) and applications for refunds for exempt sales upon which the tax was prepaid may be necessary (see, e.g., 20 NYCRR 340.1).

Plaintiffs commenced the instant declaratory judgment actions seeking to have the new regulations declared invalid and to enjoin their enforcement. Subsequently, both plaintiffs moved for a preliminary injunction restraining enforcement of the new regulations. The motions were granted. Thereafter, motions were made by the respective parties for summary judgment. Supreme court granted plaintiffs' summary judgment motions for the relief demanded in the complaint and denied defendants' cross-motions. The court also permanently enjoined defendants from, *inter alia*, enforcing the regulations. This appeal by defendants ensued.

The issues presented here are similar to those considered by the court of appeals in *Herzog Bros. Trucking v. State Tax Comm'n* (69 N.Y.2d 536 [14 Indian L. Rep. 5051]) and again considered by that court (72 N.Y.2d 720 [16 Indian L. Rep. 5003]) upon remand from the United States Supreme Court (*State Tax Comm'n of State of N.Y. v. Herzog Bros. Trucking*, 487 U.S. 1212). As here, the plaintiff in *Herzog* was a wholesaler selling a product, in that case motor fuel, to Indians on a reservation who then sold it at retail to Indian and non-Indian consumers. There, the wholesaler was to collect the fuel tax upon the first sale and the tax was then included in the retail price and passed on to the ultimate consumer (see *Herzog Bros. Trucking v. State Tax Comm'n*, 72 N.Y.2d 720, 723, *supra*). A refund or credit was made where the ultimate consumer was an Indian (*id.*). When the court of appeals initially heard the case, it reversed this court's decision which had found the tax scheme valid (*Herzog Bros. Trucking v. State Tax Comm'n*, 69 N.Y.2d 536, *supra*, rev'g, 122 A.D.2d 518). The court of appeals at that time held that:

...Congress has preempted the field of regulating trade with Indians on reservations and has left "no room" for the application of supplementary State tax laws, such as the one here at issue, that impose "additional burdens" on Indian traders. . . . Thus, no matter how minimal the burden imposed on the motor fuel taxation scheme on [the plaintiff], as a trader to the Seneca Nation, such regulation is preempted by the Federal Indian trader laws. . . (*id.*, at 546 [citation omitted]).

EXHIBIT 4
DATE 4-3-91
HB 1012

When the first *Herzog* case went to the United States Supreme Court, the case was remanded (*State Tax Comm'n of N.Y. v. Herzog Bros. Trucking*, 487 U.S. 1213, *supra*) to the court of appeals to consider the effect of the motor fuel tax scheme contained in newly enacted regulations effective November 30, 1988 and applicable to sales made after January 1, 1989. Those regulations differed from the regulations originally in issue (*Herzog Bros. Trucking v. State Tax Comm'n*, 69 N.Y.2d 536, *supra*), but are substantially similar to those at issue in the instant case. The regulations originally in issue in *Herzog* required the wholesaler to prepay sales tax on all fuel sold and apply for a refund or credit of tax paid where the ultimate sale was tax exempt. During the pendency of *Herzog*, the Department published for comment new regulations which, like the regulations now before the court, provided for preapproval of tax-free sales to Indians by registered dealers. No tax was to be paid on fuel designated for such sales at any point in the transaction (20 NYCRR 14.7[a][3]). The amount of fuel which would be reapproved for tax-free sale was set by the Department based on projected Indian consumption (20 NYCRR 14.7[a][2]; [b]). On remand from the United States Supreme Court for consideration of the case in light of the newly published regulations, the court of appeals refused to review the constitutionality of those regulations, reasoning that to do so could be to render an advisory opinion (*Herzog Bros. Trucking v. State Tax Comm'n*, 72 N.Y.2d 720, 725, *supra*).

This court is now called upon to address the constitutionality of similar regulations. When the court of appeals heard *Herzog* on remand, it referred to its analysis of the case law on the issue in the first *Herzog* case and opined that "[i]n the absence of a reversal by the Supreme court, we assume that our interpretation of those decisions and our application of them to the facts before us represents the present state of the law on the subject" (*id.* at 724-25). Accordingly, the tax scheme under review here fails because it imposes some burden, although only minimal, on the Indian trader contrary to the court of appeals' interpretation of the applicable Supreme Court decisions (*see id.*, *see also Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 690; *Herzog Bros. Trucking v. State Tax Comm'n*, 69 N.Y.2d 536, 546, *supra*). We note that this court's decision in *Matter of De Loronde* (*New York State Tax Comm'n* (142 A.D.2d 90, *appeal dismissed, lv denied*, 73 N.Y.2d 986) [16 Indian L. Rep. 5001]) was rendered November 23, 1988 without the benefit of the decision on remand in *Herzog*, which was rendered December 1988.

Opinion by MIKOLL, J., in which WEISS, J.P., LEVINE, J. and HARVEY, JJ., concur.

Order and judgment affirmed, with costs.

Counsel for appellants: Robert Abrams, Att'y Gen., Albany, New York

Counsel for respondent: Kavinoky & Cook, Buffalo, New York; Williams, Stevens, McCarville & Frizzell, Buffalo, New York

EXHIBIT 17
DATE 4-3-91
HB 1012

HOUSE OF REPRESENTATIVES

TAXATION COMMITTEE

ROLL CALL VOTE

DATE 4/3 BILL NO. 1012 NUMBER 1

MOTION: Cohen A

Failed

NAME	AYE	NO
REP. BEN COHEN, VICE-CHAIRMAN	✓	
REP. ED DOLEZAL		✓
REP. JIM ELLIOTT		✓
REP. ORVAL ELLISON		✓
REP. RUSSELL FAGG		✓
REP. MIKE FOSTER		✓
REP. BOB GILBERT	✓	
REP. MARIAN HANSON	✓	
REP. DAVID HOFFMAN	✓	
REP. JIM MADISON	✓	
REP. ED MCCAFFREE		✓
REP. BEA MCCARTHY		✓
REP. TOM NELSON	✓	
REP. MARK O'KEEFE		
REP. BOB RANEY		✓
REP. BOB REAM, VICE-CHAIRMAN		✓
REP. TED SCHYE		✓
REP. BARRY "SPOOK" STANG		✓
REP. FRED THOMAS		✓
REP. DAVE WANZENRIED	✓	
REP. DAN HARRINGTON, CHAIRMAN	✓	
TOTAL		

8 : 12

EXHIBIT 15
DATE 4-3-91
HB 1012

HOUSE OF REPRESENTATIVES

TAXATION COMMITTEE

ROLL CALL VOTE

DATE 4/3/91 BILL NO. 1012 NUMBER 1

MOTION: DP/A

w/o Colens A

NAME	AYE	NO
REP. BEN COHEN, VICE-CHAIRMAN		✓
REP. ED DOLEZAL	✓	
REP. JIM ELLIOTT	✓	
REP. ORVAL ELLISON	✓	
REP. RUSSELL FAGG	✓	
REP. MIKE FOSTER	✓	
REP. BOB GILBERT		✓
REP. MARIAN HANSON		✓
REP. DAVID HOFFMAN		✓
REP. JIM MADISON		✓
REP. ED MCCAFFREE	✓	
REP. BEA MCCARTHY	✓	
REP. TOM NELSON	✓	
REP. MARK O'KEEFE		
REP. BOB RANEY	✓	
REP. BOB REAM, VICE-CHAIRMAN		✓
REP. TED SCHYE	✓	
REP. BARRY "SPOOK" STANG	✓	
REP. FRED THOMAS		✓
REP. DAVE WANZENRIED	✓	
REP. DAN HARRINGTON, CHAIRMAN		✓
TOTAL		

12 : 8

HOUSE OF REPRESENTATIVES

VISITOR'S REGISTER

1 of 2

Taxation COMMITTEE BILL NO. HB1012
 DATE 4/3/91 SPONSOR(S) Rep Elliott

PLEASE PRINT

PLEASE PRINT

PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	BILL	OPPOSE	SUPPORT
STAN FEIST	Sheehan MAFest	1012	X	
Joe Johnson	Big Sky Brokerage	1012	X	
BOB NOBLE	Self	1012	X	
Dave Baker	Belly Seg + vnc	1012	X	
JAY BENNETT	Sheehan MAFest	1012	X	
Steven Smith	UNITED TRUCK LINES	1012	X	
Rudi Walter	TWA Police Smoke shop	1012	X	
Lonny, O. Stenhouse	Jac Smoke King	1012	X	
Margaret "Binky" Hall	Jiffy Stop - Pablo mt	1012	X	
Frank J. Smith	H & S Smoke Shop & vending	1012	X	
Orin Daniels	Sheehan MAFest	1012	X	
ERIC KAPCAN	Various Smoke shops & vendors	1012	X	
Al Burgess	Sidney, Mt. East-Mont	1012	X	

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORM
 ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HOUSE OF REPRESENTATIVES

VISITOR'S REGISTER

Page 2 of 2

DATE 4/3/91 SPONSOR(S) Rep. Elliott COMMITTEE Taxation BILL NO. H61012

PLEASE PRINT

PLEASE PRINT

PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	BILL	OPPOSE	SUPPORT
Bob Ferraris	H.D. 9	1012	X	
Emeline M. Stevenson	Tribal attorney Salish-Kootenai Tribes	1012	X	
Art Van Dusen		1012	X	
Steve Buckner	Service Distributing	1012	X	
Jill Miller	Dept of Revenue	1012		✓

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

Senator Thayer asked how much money is in the old fund.

Jean Riley said there is \$6.5 million in the old fund. The fee collection goes off in October and will off until the balance drops below \$4 million. The EPA will not allow anything else to be attached to the old fund due to the unknown amount of tanks that may need to be covered.

Senator Doherty asked what tanks are covered under this bill.

Rep. Stang said it should cover all the tanks in the state, especially for farms, ranches and small businesses. The owners cannot sell property if there is a leak and it is not fixed.

Senator Towe said the railroad exclusion is a valid concern.

Rep. Stang replied, "if we included railroads the fund would be broke tomorrow". There is just no way to afford to clean up their spills.

Mr. Havdahl felt there would be no problem with including them if they are taxed.

Senator Towe said what they contributed in taxes would be a lot less than what they would take out.

Havdahl doesn't know how much diesel the railroads purchase in the state.

Closing by Sponsor:

Rep. Stang closed.

HEARING ON HOUSE BILL 1012

Presentation and Opening Statement by Sponsor:

Rep. Elliott, District 51, said cigarettes in Montana are sold to members of Indian tribes tax free. In Montana there is a significant loss of tax revenue because of sales to non-tribal members. Since 1979 the sale of tax free cigarettes has gone from 4% of total cigarettes sold to 29%. He said he is not trying to contest federal statutes or opinions that tribal members cannot be taxed. The issue is recovering the tax that is avoided by in state and out of state purchasers of non-tax cigarettes. We are losing tax revenue because a misdemeanor is being committed when cigarettes which are not stamped are purchased by non-tribal members. Of the 29% of the tax free cigarettes sold in Montana which amounts to 23.5 million packs, 83% are sold on the Flathead Indian reservation. This would amount to 4,582 packs per tribal member. Even the tourist

traffic can't account for sales of that magnitude. Washington state has found there has been extensive smuggling activity (in cigarettes) into the state from Montana and Idaho. If the bill is enacted, there will be a loss in revenue to people who sell cigarettes and the leakage will stop. There will still be enough taxed cigarettes sold to garner over \$2.5 million in the next biennium. The bill requires that all cigarettes sold in the state bear a stamp stating that the tax has been paid (except for military reservations). It collects the tax from wholesalers, provides a tax free allocation of cigarettes to people doing business on the reservations, and provides for wholesaler rebate if the wholesaler passes the rebate on to the retailer. The bill is effective on passage and approval and the applicability date is July 1 of the fiscal year. It sunsets July 1, 1993 and provides for a penalty for sale of unstamped cigarettes.

Proponents' Testimony:

Rep. Stang presented a letter from Ole's Country Store in support of the bill (Exhibit 21). He said he had helped write the argument against the increase in cigarette taxes last election. He said as taxes go up, there will be increased sales on the reservations.

Jeff Miller, Administrator, Income and Miscellaneous Tax Division, Department of Revenue, said cigarette tax evasion is a significant problem in Montana. The bill addresses the "casual smuggling" problem. Mr. Miller reviewed Exhibit # 22 with the committee. He said the tribes and DOR must work out the allocation details probably by multiplying the population of the tribe x the average consumption and then negotiating the distribution. There are no new regulations for documentation of sales for wholesalers. He said DOR would try to do refunds by wire transfer to keep refund delay to a minimum. The penalty would be \$250 for the first pack and \$10 a pack thereafter. He noted only 7 wholesalers currently supply all the reservations in the state at present. He said there is sufficient leakage off the three reservations to merit this bill.

Bill Steven, Montana Food Distributors Association, said they supported this legislation in the previous session and will continue to do so with this bill.

Opponents' Testimony:

Ken Kratz, Joe's Smoke Ring, presented his testimony in opposition to the bill (Exhibit #23). He also presented other letters in opposition to the bill (Exhibits #24, #25, and #26).

Dave Hardin, Sheehan Majestic, Missoula, presented his testimony in opposition to the bill (Exhibit #27).

Al Burgess, Sidney, expressed opposition to the bill.

Frank Smith, Poplar, presented his testimony in opposition to the bill (Exhibit #28).

Jay Bennett, Sheehan Majestic, Missoula, presented his testimony in opposition to the bill (Exhibit #29).

Jerry Stinson, Big Sky Brokerage, Great Falls, presented her testimony in opposition to the bill (Exhibit #30).

Bob Noble, non-tribal member living on the reservation, said he felt major adjustments need to be made in the bill. He urged the committee to give the bill a do not pass recommendation. There should be caution and negotiation, not legislation.

Eric Kaplan, Attorney, Columbia Falls, presented his testimony in opposition to the bill (Exhibit #31).

Evelyn Stevenson, Tribal Attorney, Confederated Salish and Kootenai Tribes, submitted her testimony in opposition to the bill (Exhibit #32).

Larry Akey, Montana Tobacco Distributors, presented letters in opposition to the bill from several individuals (Exhibits #33 -38 and a petition Exhibit #39).

Questions From Committee Members:

Senator Harp felt the effective date should be July 1, 1993, in order to allow DOR time to negotiate with the tribes. He felt the termination date is not needed as some tribes are not getting the benefits they should be getting.

Jeff Miller replied DOR feels the situation has been studied enough and there is no reason to delay implementation and enforcement.

Senator Harp said two months is not enough time to fairly negotiate the provisions of this bill.

Mr. Miller said the only issue to negotiate is the distribution of the allocation.

Senator Towe questioned Mr. Kaplan about the Supreme Court decision re Oklahoma vs Citizen Band Potawatomi Indian Tribe of Oklahoma.

Mr. Kaplan presented a copy of the decision to the committee (Exhibit #40).

Closing by Sponsor:

Rep. Elliott closed by saying if your business predicates its profit making on an activity which is statutorily illegal, it is a bad business practice. He felt the unconstitutionality issue is addressed in the Supreme Court case. This is tax on non-indians, not tribal members, he emphasized. It is time to stop the shipment of non-taxed cigarettes out of the state.

HEARING ON HOUSE BILL 321Presentation and Opening Statement by Sponsor:

Rep. Ream, District 54, said this is a simple bill and is just a matter of public policy. Interest and penalties collected from corporate and individual income taxes will go into the general fund rather than being portioned out on the same basis that the tax itself is portioned out.

Proponents' Testimony:

There were no proponents.

Opponents' Testimony:

There were no opponents.

Questions From Committee Members:

There were no questions.

Closing by Sponsor:

Rep. Ream closed.

EXECUTIVE ACTION ON HOUSE BILL 321Recommendation and Vote:

Senator Brown moved HB 321 Be Concurred In.

The motion CARRIED unanimously.

ROLL CALL

SENATE TAXATION COMMITTEE

DATE 4/10/91

52nd LEGISLATIVE SESSION

NAME	PRESENT	ABSENT	EXCUSED
SEN. HALLIGAN	X		
SEN. ECK	X		
SEN. BROWN	X		
SEN. DOHERTY	X		
SEN. GAGE	X		
SEN. HARP	X		
SEN. KOEHNKE	X		
SEN. THAYER	X		
SEN. TOWE	X		
SEN. VAN VALKENBURG	X		
SEN. YELLOWTAIL	X		

Each day attach to minutes.

COMMITTEE ON

DATE

April 10, 1991

Senate Taxation

HB 795

1012

973

341

340

976

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Bab Stephens	Mountain Stream Assoc	973		X
Ellen Stevenson	CSK Fulmer	1012		X
DARYL REED	OLYMPUS ENVIRONMENTAL	973	X	
Jean Riley	Petroleum Tank Release ^{Revised} Compensation	973	X	
Cindy Anderson	Dept of RW Motor ^{Fuel} Tax	973		
Dorothy Christensen	Juan Smoke Ring	1012		X
Bob Noble	Self	1012		X
Jay BENEVE	Sheehan Motors Inc	1012		X
Jim Leach		795	X	
Dave Hardin	Sheehan Motors	1012		X
Frank Smith	H & B Vending	1012		X
Al Burgess	Eastmont Wholesale	1012		X
JAMES TUTWILER	MT Champion	HB 795	✓	
Gordon Morris	MACO	HB 973	✓	
Stephen D. Vision	WPM Int	HB 973	✓	
Nerby Stinson	Big Sky Brokerage	HB 1012		✓
Anna M. Miller	DNRC	HB 795		
John Tubbs	DNRC	HB 795		
Charles Brooke	Conroe	HB 795		
Ray Bob Backus	Self	HB 795	✓	
Lorne Frank	Dawn Bureau	HB 973		X
Don All	Mt. Wood Products Assoc	HB 340	✓	
Helen M. Taylor	City of Assoula	HB 715	✓	
Alec Hansen	MLCT	HB 795	✓	
Jeff Miller	Department of Revenue	HB 1012	✓	
FL Mahan	Sup Superior Sch Dist	973		

(Please leave prepared statement with Secretary)

7/10

DATE
Expiration

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Koehler Stout	Mineral Products Corp	976	✓	
A. Nadine Oberg	Montana Solid Waste Contractors	973	✓	
Janet Elliot	MT Audubon	HB 340	✓	
R. Clifton Laughrey	MT. Dept of Revenue	1012	✓	
Ben Hudson	MT Motor Owners Assn	973		X
ERIC KAPLAN	Indian Retailers	1012		X
Stan & Peggy H	MT Mining Assoc.	HB 976	X	
Christine Kaufmann	MEIC	HB 973	✓	
Bill Stevens	MT Food Dist Assn	1012	✓	
Peggy Egan	Self			✓
Alington	MT Live Farm Com	HB 340	✓	
Earl D. Hoyle	W. R. Hyman & Co.	HB 976	✓	
Jim Jensen	MEIC	HB 340	X	
Stan Bradshaw	MT. T.C.	HB 340	✓	
Paul H				

(Please leave prepared statement with Secretary)

Phone 721-2170

2501 Callin, Suite 207

P.O. Box 3356

Missoula, MT 59806



Representative Darry Stang
Members of Senate Taxation Committee
Montana State Legislature
Helena, Montana

Honorable Representative Stang and Committee Members

I am writing to express my full support, and that of the independent operators of 13 Ole's Country Stores in Western Montana for H.B. 1012.

We have been trying to find a solution to an unfair situation that has existed in the state of Montana concerning the illegal sale of non-taxed cigarettes to non-tribal members for over fifteen years, and feel that H.B. 1012 is the answer. Many of our stores are located close to the reservation and we have seen a steady loss of sales of taxed cigarettes to reservation outlets as excise taxes have increased throughout the years.

H.B. 1012 offers a fairly simple method of control that will allow tribal members to purchase cigarettes un-taxed, yet prevent the majority of the smoke shop sales of untaxed cigarettes to non-members, as originally intended by the legislature. We are unable to compete fairly under the present situation. It not only costs us profits, store traffic, and jobs that previously existed but the big loser is the state of Montana. Efforts to increase state excise taxes to make up for declining revenues by increasing excise taxes will only encourage more non-members to buy cigarettes on the reservation.

During the last legislative session H.B. 440 was killed in committee due mainly to the tribes testimony that it will cost jobs on the reservation. I hate to think that allowing an illegal activity is justified because it provides tribal members with a job.

We not only pay license fees to sell cigarettes, but collect excise taxes at our own expense, not to mention the state income tax we and our employees pay.

We urge you to put us back in a competitive situation with all cigarette retailers in the state. It is the only equitable solution, and, it is the best situation for the state of Montana.

Please pass H.B. 1012.

Thank You,

Mark R. Olson

Mark Olson

President

Ole's Country Stores

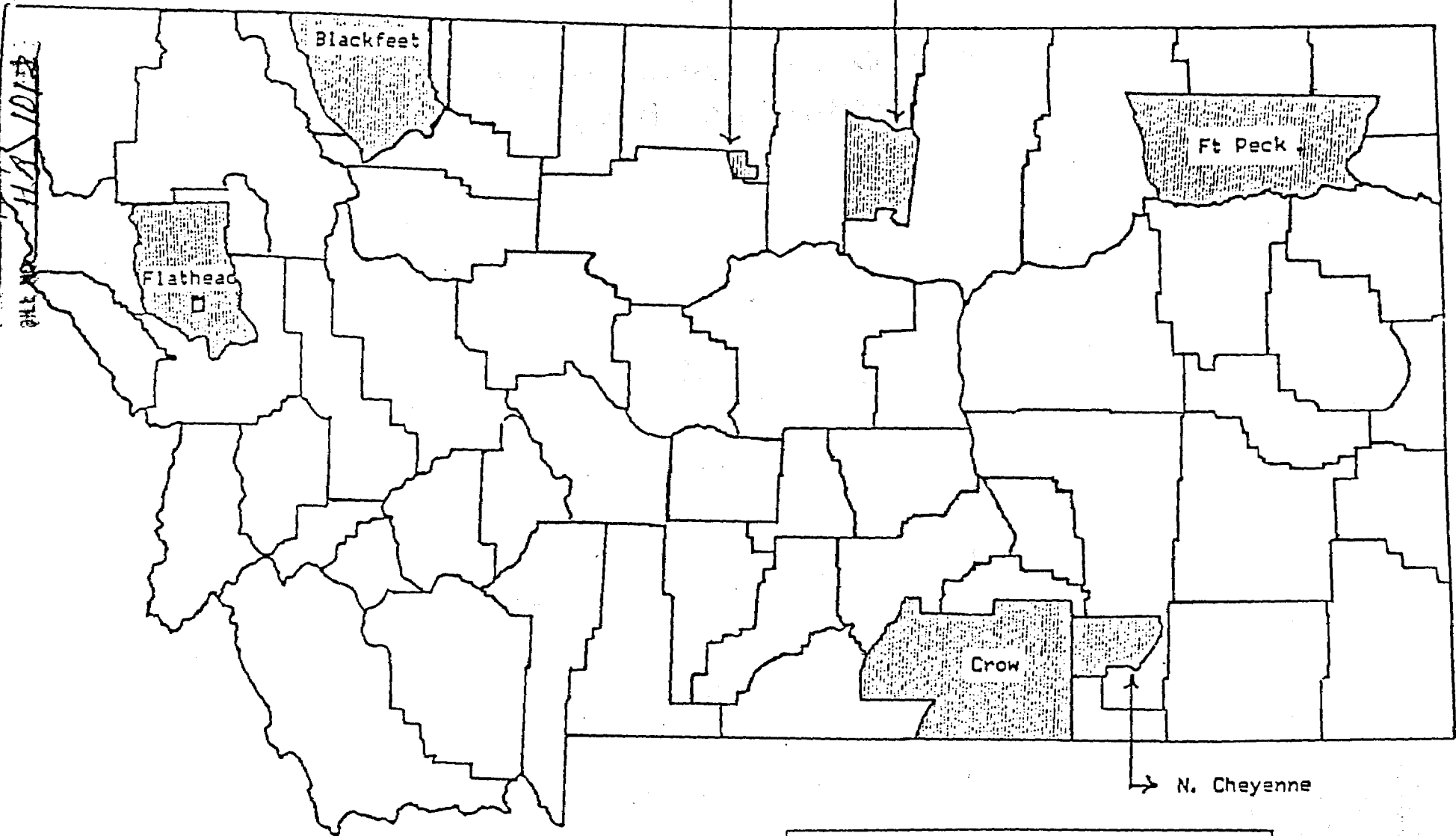
SERIAL LOCATION

EXHIBIT NO. 22

DATE 4/10/91

FILE NO. 44-1013

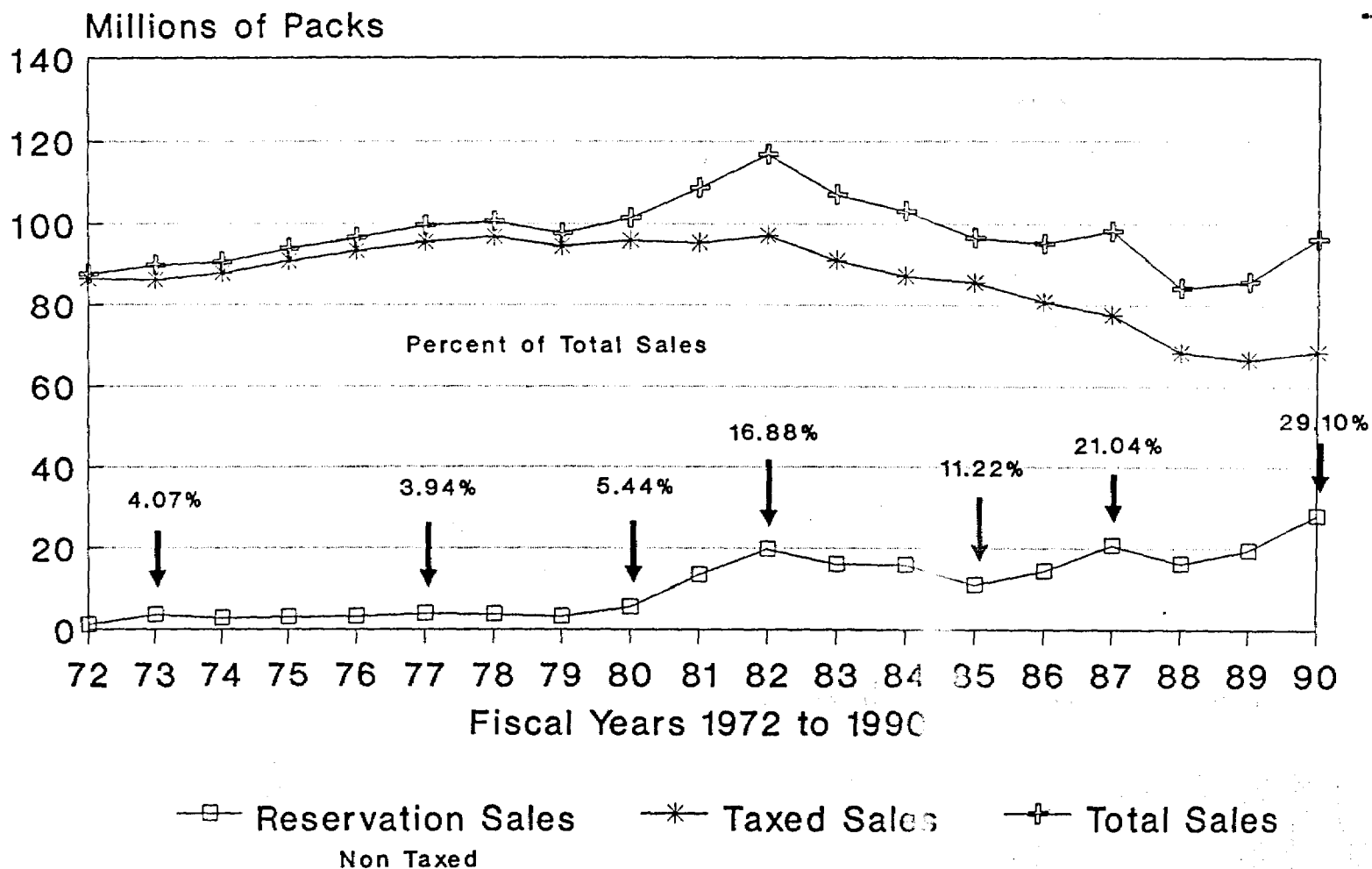
→ Rocky Boy → Ft Belknap



STATE OF MONTANA
INDIAN RESERVATIONS

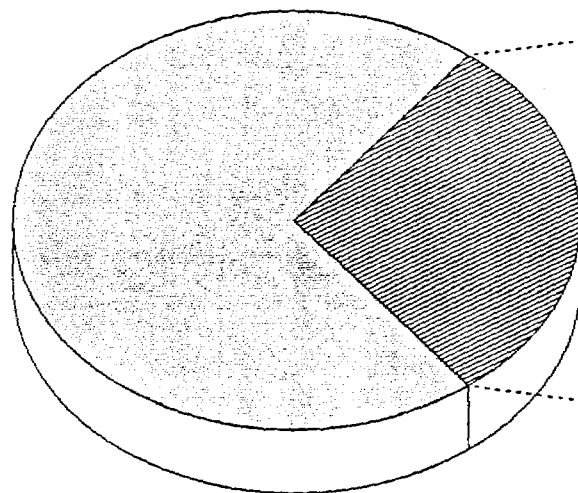
#1012

Total Cigarette Sales Taxed and Untaxed



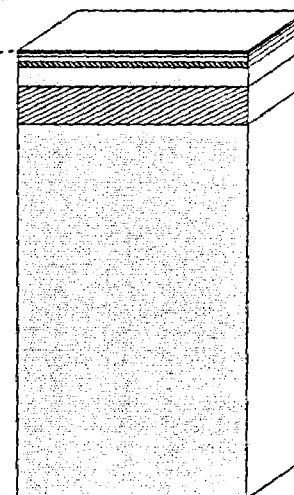
1990 Distribution of Cigarette Sales Total Packs Sold

Taxable Sales
71%
68,308,062



Reservation
Sales
29%
28,034,910

All Others
8.0%
2,220,390



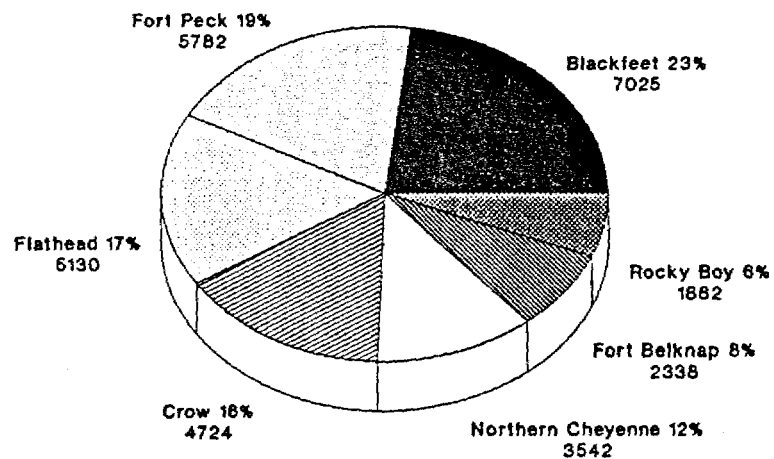
Blackfeet
8.2%
2,310,380

Flathead
83.8%
23,504,140

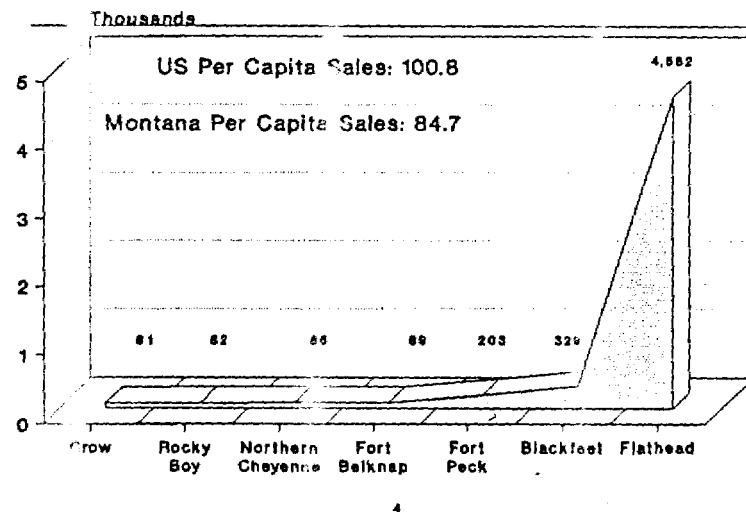
Total Sales
96,343,530

Sales Breakdown To Reservations

Reservation Population
Source: US Census



Reservation Per Capita Consumption
Packages of Cigarettes Per Person



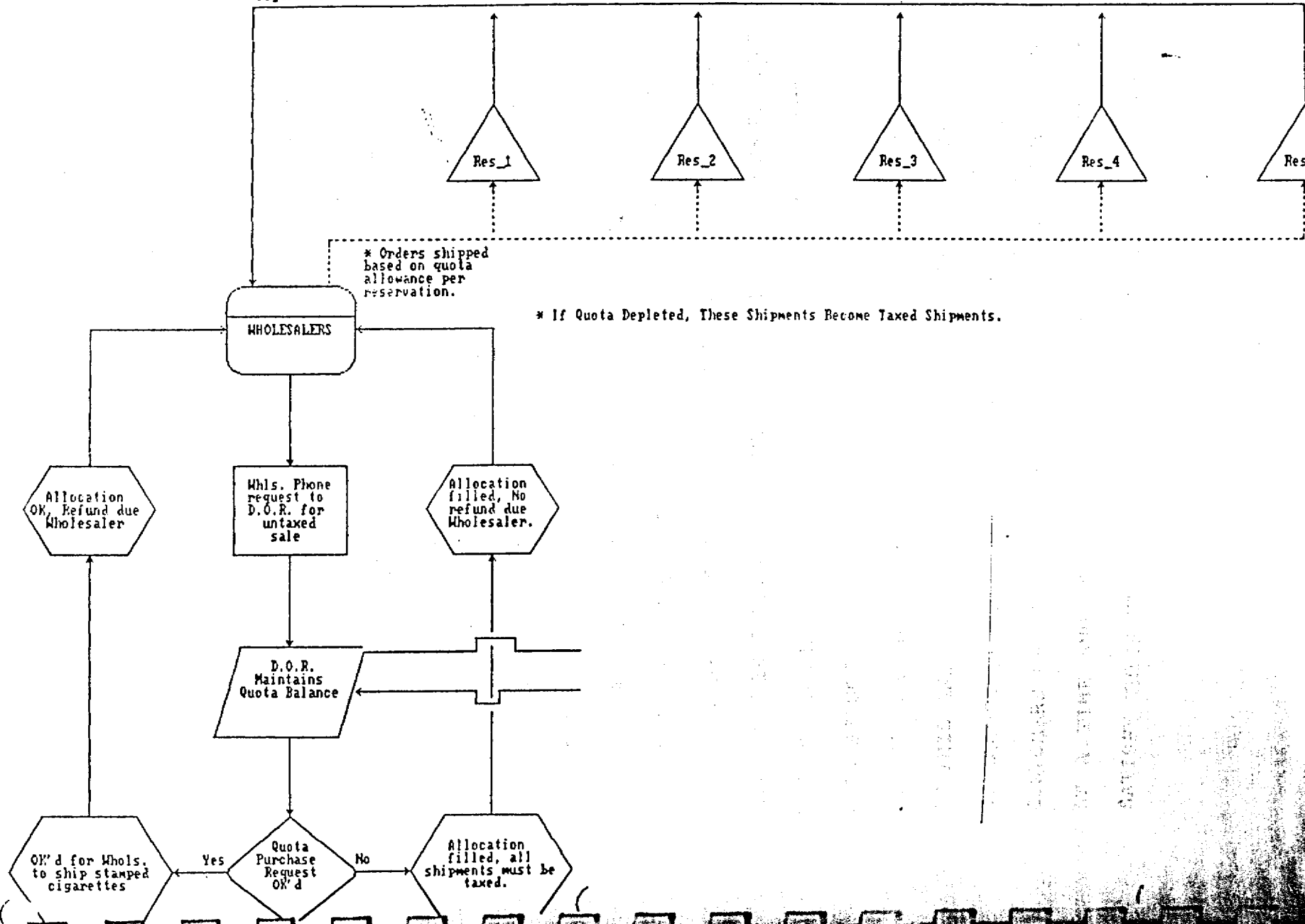
Additional Cigarette Tax Collections
Resulting From Per Capita Allocations

FY90 Total Sales To Reservations:	28,034,910
Less - Estimated Out-of-State Exports:	17,280,000
Less - Per Capita Allocation:	2,738,070
 Total Additional Taxable Packages:	 8,016,840
Effective Tax Rate: 17.3214%	
 Additional Cigarette Tax Collections:	 \$1,389,000

CIGARETTE TAX QUOTA SYSTEM CHART

PROCESS STARTS:

Requests from smokeshops
to wholesalers for
cigarette orders.



10/2

TESTIMONY OF KEN KRANTZ
GENERAL MANAGER OF JOE'S SMOKE RING
ON HOUSE BILL 1012
BEFORE THE SENATE TAXATION COMMITTEE
ON APRIL 10, 1991

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE. MY NAME IS KEN KRANTZ. I AM THE GENERAL MANAGER OF JOE'S SMOKE RING WITH RETAIL BUSINESS LOCATED IN EVARO AND ARLEE, MONTANA.

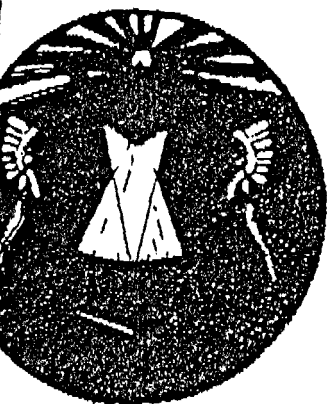
AT THESE RETAIL OUTLETS, WE SELL GASOLINE, FAST FOOD, GENERAL MERCHANDISE AND, OF COURSE, OUR SUBJECT TODAY, CIGARETTES. JOE'S SMOKE RING HAS 37 FULL TIME EMPLOYEES AND THAT'S RIGHT NOW WHEN WE ARE AT THE LOW EBB OF OUR OPERATION. THIS FIGURE GOES UP TO 60 EMPLOYEES DURING OUR PEAK SEASON OF APRIL THROUGH THE END OF HUNTING SEASON IN NOVEMBER. OUR TOTAL YEARLY PAYROLL IS OVER \$500,000.

WE HAVE BEEN IN BUSINESS FOR OVER 19 YEARS. AS THE MANAGER OF THESE BUSINESSES FOR THE PAST 9 YEARS, I CAN TELL YOU TODAY THAT OVER 75% OF THE CIGARETTES WE SELL ARE TO OUT-OF-STATE TOURIST TRAFFIC. IN FACT, DURING OUR OFF-SEASON, OUR SALES PERCENTAGES ARE 50% TO IN-STATE RESIDENTS - 50% TO OUT-OF-STATE, BUT DURING OUR PEAK SEASON, THE PERCENTAGES ARE DRASTICALLY REVERSED AND WE SELL 80% OF OUR CIGARETTES TO OUT-OF-STATE BUYERS. WHAT IS THE EFFECT OF THIS AND WHAT IS THE RELEVANCE TO HOUSE BILL 1012? OF THAT 80% OF OUT-OF-STATE BUYERS, AT LEAST HALF BUY IN VOLUME. WE HAVE CUSTOMERS WHO HAVE BEEN WITH US FOR YEARS WHO BUY 30-100 CARTONS AT A TIME AND IN FACT CALL AHEAD TO SEE IF WE ARE STOCKED TO SATISFY THEIR NEEDS. PRIMARILY, THESE PEOPLE CONSIST OF OUT-OF-

23
STATE TRUCKERS, SALES PEOPLE AND OTHER REGULAR OUT-OF-STATE VISITORS. COMPARED TO THESE CUSTOMERS, THE IN-STATE DRIVER WHO COMES TO THE RESERVATION TO GET TAX-EXEMPT CIGARETTES IS A VERY SMALL PART OF OUR BUSINESS.

THE TRUTH OF THE MATTER IS THESE CUSTOMERS ARE PEOPLE WHO FOR THE MOST PART WOULD NOT BUY CIGARETTES IN THE STATE OF MONTANA WERE IT NOT FOR THE DISCOUNT PRICE AND WERE IT NOT FOR THE RELATIONSHIP THAT THEY HAD BUILT UP OVER THE YEARS WITH JOE'S SMOKE RING. THE FISCAL NOTES ESTIMATION OF A MILLION OR MORE DOLLARS IN ADDED REVENUES TO THE STATE OF MONTANA WILL SIMPLY NOT HOLD UP. THE FACT IS THAT IT WILL BE A FRACTION OF THIS BECAUSE THE CIGARETTE SALES THAT ARE SUPPOSED TO GENERATE THIS TAX REVENUE WILL SIMPLY NOT OCCUR.

ON THE OTHER HAND, WHAT WILL HAPPEN AND IS REAL IS THE EFFECT THIS WILL HAVE ON MINE AND OTHER BUSINESSES LIKE MINE. I'LL GIVE YOU STRAIGHT FACTS. I'LL GIVE YOU FACTS THAT WILL HOLD UP. I'VE MADE THE MOST CONSERVATIVE ESTIMATE THAT I CAN OF THE EFFECTS OF THE PASSAGE OF THIS BILL. I ESTIMATE THAT WE WOULD IMMEDIATELY LOSE 10 FULL TIME PAYING JOBS, RANGING IN SALARY FROM \$28,000 PER YEAR FOR MYSELF TO DOWN TO \$22,000 PER YEAR FOR ONE OF OUR STAFF. 10 PEOPLE WOULD LOSE A COMBINED YEARLY WAGE OF \$115,176 AND THAT'S BEFORE YOU USE THE MULTIPLIER OF WHAT THOSE \$115,000 WOULD DO IN THE COMMUNITY, WHICH YOU KNOW IS 4. SO RIGHT OFF THE TOP WE'VE LOST ALMOST A HALF A MILLION DOLLARS IN SALARY. IN ADDITION, THOSE 10 FAMILIES, A NUMBER OF WHICH ARE SINGLE PARENT FAMILIES, HAVE A TOTAL NUMBER OF DEPENDENTS OF 47. THIS IS MY MOST CONSERVATIVE ESTIMATE. A MORE REALISTIC ESTIMATE IS THAT 15 TO 20 OF THE FULL



CROW TRIBAL COUNCIL

P.O. Box 159
Crow Agency, MT 59022
(406) 638-2601

SENATE TAXATION

EXHIBIT NO. 24

BILL NO. HB 1012

Clara Nomee, Madame Chairman
Joseph Pickett, Vice-Chairman
Blaine Small, Secretary
Sylvester Goes Ahead, Vice-Secretary

Crow Country
April 9, 1991

Montana Senate Taxation Committee
Attn: Senators Yellow Tail and Towe
Capitol Station
Helena, Montana 59620

RE: HB 1012 - Applying State Cigarette Sales Tax on
Indian Reservations

Senators:

The Crow Tribe of Indians strongly opposes the above proposed bill.

Businesses operating on Indian Reservations which sell cigarettes at discounted prices provide some employment opportunities for tribal members, while in a small way contributing to the local economy. Our unemployment rate hovers around 80%. There are other, more technical and legal, reasons why we oppose HB 1012, but the employment factor should suffice in our view.

Thank you for your time, consideration, and support for the position of the Crow Tribe of Indians on this important matter.

Sincerely,

CLARA WHITE HIP NOME
Madam Chairman, Crow Tribe

E. WENT NO.

25

DATE

4/1/91

BILL NO.

HB 1012

April 08, 1991

To Whom It May Concern:

I am writing this letter in opposition to
HB 1012.

As a ^{small} business located within the boundaries of
the Blackfeet Reservation, I feel this bill would have an
adverse effect on our sales.

As a tribal member of the Blackfeet Tribe, I am
against this bill. Generally speaking, any reservation is
economically depressed more so than the rest of the
state/nation. I feel ^{you are} trying to hamper each Tribe/preservation
in one of the few economic incentives they have available
to them. The passage of this bill will have an adverse
effect on an "already" ^{economically} depressed area.

Thank you -

Rita Horn

P.O. Box 12

Browning, MT 59417

RANDE WALTON
TINA MARIE'S SMOKE SHOP - RONAN. MONTANA
APRIL 5. 1991

STATE TAXATION
NO. 26
DATE 4/10/91
BILL NO. 113 10/24

MR. CHAIRMAN. MEMBERS OF THE COMMITTEE:

MY NAME IS RANDE WALTON. MY WIFE, TINA, OWNS AND OPERATES TINA MARIE'S SMOKE SHOP. A SMALL BUSINESS WHICH EMPLOYS 9 PEOPLE. 8 OF WHICH ARE NON-TRIBAL MEMBERS. OF THAT 9, 5 ARE DIRECTLY OFF THE WELFARE ROLLS AND ARE NOW ON THE TAX ROLLS. WHICH CERTAINLY LEADS TO A MORE PRODUCTIVE PERSON IN OUR COMMUNITY.

DUE TO OUR SMALL BUSINESS, WE HAVE 29 MONTHLY ACCOUNTS FOR GOODS AND SERVICES, WHERE THE MONEYS ARE MOSTLY PAID BACK INTO OUR OWN ECONOMY.

DUE TO THE CURRENT SITUATION ON TRIBAL CIGARETTES. WE EMPLOY THESE 9 PEOPLE AND OUR DAY TO DAY BUSINESS CARRIES ON. IF THIS BILL PASSES, WE SURELY WOULD NOT NEED 9 EMPLOYEES. THESE 9 PEOPLE ARE EMPLOYED BECAUSE THE SALES OF OUR CIGARETTES ARE SEEN AS A BARGAIN TO OUT-OF-STATE TRAVELERS AND AREA PEOPLE ALIKE.

OUR LOCAL ECONOMY IS STIMULATED GREATLY BY THESE MONEYS AND IT CERTAINLY DOES HAVE A GOOD EFFECT ON THE TRIBAL OPERATORS. BY WAY OF GREATER SELF-ESTEEM AND SENSE OF PRIDE.

MY WIFE, BEING A TRIBAL MEMBER ON THE RESERVATION. COULD PUT ALL OUR PERSONAL PROPERTY IN TRUST. PAYING NO STATE TAX. WE HAVE NOT AND DO NOT ELECT TO DO THIS. WE PAY PERSONAL PROPERTY TAX AS ANY NON-TRIBAL MEMBER DOES.

I PERSONALLY HAVE WORKED CONSTRUCTION AND OIL FIELDS OVER THE LAST 12 YEARS. THE MONEYS THAT I'VE USED FOR MY DOWN PAYMENTS AND OPERATING CAPITAL CAME MOSTLY FROM ALASKA AND NORTH DAKOTA DUE TO THE SITUATION IN MONTANA IN THOSE TWO TRADES.

WE ARE CURRENTLY 4 YEARS INTO A 10-YEAR NOTE ON OUR BUSINESS AND 19 YEARS OUT ON MY HOME LOAN. WE FIND IT HARD TO BELIEVE THAT I WOULD HAVE TO RESORT BACK TO MY OLD OUT-OF-STATE JOBS TO BE ABLE TO LIVE IN MONTANA. AS FOR THE 9 EMPLOYEES. I GUESS IT'S BACK TO THE WELFARE LINES.

GENTLEMEN, THIS BILL DOES NOTHING FOR MY FUTURE IN MONTANA. I ASK FOR YOUR OPPOSITION TO HB 1012.

THANK YOU.

Tina M. Walton

676-0311

Rande Walton

LETTER NO. 37
DATE APRIL 10, 1991
BILL NO. 113 10/1/91

TO: MR. CHAIRMAN AND MEMBERS OF THE SENATE TAXATION COMMITTEE
RE: HOUSE BILL 1012

=====

MY NAME IS DAVE HARDIN. I AM AN EMPLOYEE IN THE CIGARETTE DEPARTMENT OF SHEEHAN MAJESTIC, A FAMILY OWNED BUSINESS IN MISSOULA, MONTANA. I HAVE BEEN EMPLOYED THERE FOR 4 YEARS AND ENJOY MY JOB.

I AM A 5TH GENERATION MONTANAN AND LOVE THIS STATE. IT'S HARD TO FIND GOOD JOBS IN MISSOULA, ESPECIALLY NOW THAT WE HAVE THE RECENT MILL CLOSURES. I HAVE FAMILY OF FOUR TO RAISE, AND IT TAKES A GOOD JOB TO DO THIS. I HAD TO LEAVE MONTANA IN THE 1970'S FOR 3 1/2 YEARS TO FIND WORK AND WAS NOT ABLE TO COME BACK TO MONTANA UNTIL I FOUND A JOB AT SHEEHAN MAJESTIC. IF THIS BILL WERE TO PASS, MYSELF AND 5 OTHER SHEEHAN MAJESTIC EMPLOYEES THAT I SPEAK FOR WOULD LOSE OUR JOBS. WE DO NOT WANT TO LEAVE MONTANA AGAIN TO FIND A GOOD JOB.

SO WE URGE THIS COMMITTEE TO PLEASE VOTE DOWN HOUSE BILL 1012.

DAVE HARDIN, EMPLOYEE
SHEEHAN-MAJESTIC, MISSOULA, MONTANA

* * * * *
 * TESTIMONY OF FRANK SMITH, OWNER *
 * H & S SMOKE SHOP - POPLAR, MONTANA *
 * BEFORE THE SENATE TAXATION COMMITTEE *
 * ON APRIL 10, 1991 *
 * REGARDING HOUSE BILL 1012 *
 * * * * *

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE: MY NAME IS FRANK SMITH. I AM THE OWNER OF THE H & S SMOKE SHOP AND VENDING IN POPLAR, MONTANA. I CURRENTLY EMPLOY 17 PEOPLE, BOTH TRIBAL AND NON-TRIBAL.

APPROXIMATELY 20% OF OUR INCOME COMES FROM CIGARETTES. WE ARE USING THEM MOSTLY AS A DRAWING TO SUPPORT OUR SALES OF THE STORES. I FEEL THIS BILL COULD CAUSE A HARDSHIP ON OUR BUSINESS AND ALSO ON THE WHOLESALERS IN THE STATE. IN ADDITION, I DON'T THINK IT WILL STOP NON-TAX SALES. IN FACT, I HAVE BEEN APPROACHED BY A NORTH DAKOTA BUSINESS WITH THE PROPOSAL OF PURCHASING FROM HIM IN THE EVEN THIS BILL PASSES.

THIS BILL WILL EITHER (1) RAISE THE COST OF MY DOING BUSINESS, (2) FORCE ME TO CUT BACK ON MY SALES FORCE, CREATING MORE UNEMPLOYMENT IN AN AREA ALREADY IN BAD SHAPE FOR JOBS, AND/OR (3) FORCE ME TO BUY OUT-OF-STATE, HURTING THE BUSINESS OF OUR LOCAL DISTRIBUTORS.

SOME OF THE INCOME OF THE SHOPS IS USED FOR YOUTH PROGRAMS. IN THE YOUTH BASKETBALL TOURNAMENTS IN GREAT FALLS AND POPLAR THIS PAST WINTER, SEVERAL OF THE TEAMS WERE SPONSORED BY SMOKE SHOPS. ALSO 4-H PROGRAMS, BOY SCOUT TROOPS AND SOME HEAD-START ACTIVITIES IN AND AROUND THE RESERVATIONS ARE RECIPIENTS OF THE SMOKE SHOPS' COMMUNITY EFFORTS, WHICH I FEEL IS IMPORTANT AT THIS TIME, WITH ALL THE PROBLEMS WE ARE HAVING WITH YOUTH.

THANK YOU FOR YOUR TIME AND I WOULD APPRECIATE YOUR VOTE AGAINST HOUSE BILL 1012.

SENATE TAXATION
EXHIBIT NO. 11/10/91

TESTIMONY OF JAY BENNETT, MANAGER
SHEEHAN MAJESTIC - MISSOULA, MONTANA
BEFORE THE SENATE TAXATION COMMITTEE
REGARDING HOUSE BILL 1012
APRIL 10, 1991

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: MY NAME IS JAY BENNETT. I AM THE MANAGER OF SHEEHAN MAJESTIC, A FAMILY OWNED BUSINESS FOR OVER 35 YEARS, LOCATED IN MISSOULA, MONTANA.

CURRENTLY, WE EMPLOY 32 FULL TIME EMPLOYEES AT OUR WAREHOUSE. IF THIS BILL SHOULD PASS, I AM LOOKING AT LAYING-OFF 6 EMPLOYEES! THESE 6 EMPLOYEES ARE TAX PAYING MONTANANS, WHOSE GROSS WAGES ARE OVER \$25,000 EACH. THERE ARE SOME POINTS I THINK THE COMMITTEE SHOULD BE AWARE OF.

1) THIS IS MORE THAN A CIGARETTE ISSUE. WE ALSO SUPPLY GROCERIES AND CANDY AS WELL AS DELI ITEMS TO THESE ACCOUNTS. WE STAND IN JEOPARDY OF LOSING THIS BUSINESS ALSO, DUE TO THE FACT THAT WE WILL NOT BE ABLE TO SUPPLY THEIR CIGARETTE NEEDS.

2) ENFORCEMENT OF THIS BILL. IT APPEARS THAT HB1012 WOULD BE AN ADDED BURDEN TO THE DEPARTMENT OF REVENUE. THE DEPARTMENT OF REVENUE HAS EXPRESSED THAT IT IS UNDERSTAFFED TO DO AUDITS ON OUT-OF-STATE WHOLESALERS. I KNOW OF OTHER OUT-OF-STATE WHOLESALERS WHO HAVE NEVER BEEN AUDITED ON CIGARETTES OR TOBACCO PRODUCTS. HOW CAN THEY NOW, ALL OF A SUDDEN, POLICE THIS BILL?

3) IN 1972, LEGISLATION IN THIS LEGISLATIVE BODY GAVE US THE RIGHT TO SELL CIGARETTES TO THE INDIAN RESERVATIONS. THIS MEANT A POSITIVE GROWTH IN OUR BUSINESS AND A SIGNIFICANT INVESTMENT TO ACCOMODATE THIS. THIS IS NOT ONLY A POSITIVE GROWTH, WITH MORE JOBS FOR MONTANANS, BUT WE HAVE MAINTAINED A GOOD WORKING RELATIONSHIP WITH THE DEPARTMENT OF REVENUE ON THESE MATTERS.

4) DO WE REALLY WANT THESE GOOD EMPLOYEES, THESE MONTANA INCOME TAX PAYING CITIZENS TO FALL OFF THE TAX ROLLS AND ONTO UNEMPLOYMENT AND WELFARE, ALONG WITH THEIR FAMILIES? I HOPE NOT. AS A MONTANA DISTRIBUTOR, WE WORK WITH THE DEPARTMENT OF REVENUE. THIS ISN'T GOING TO BE JUST ANOTHER LOSS TO THE WHOLESALERS AS WELL AS OTHERS, BUT ALSO TO THE DEPARTMENT OF REVENUE, WHO WILL SURELY LOSE CONTROL OF THE CIGARETTES COMING INTO THE STATE FROM OUT-OF-STATE WHOLESALERS.

COMMITTEE MEMBERS, PLEASE REMEMBER THESE POINTS:

- 1) THE CIGARETTES ARE STORED IN A BONDED MONTANA WAREHOUSE.
- 2) THEY ARE TRUCKED BY MONTANA FREIGHT CARRIERS TO MONTANA DISTRIBUTORS.
- 3) MONTANA EMPLOYEES DISTRIBUTE THESE CIGARETTES.

IN CLOSING, I URGE YOU TO VOTE AGAINST HOUSE BILL 1012 AND KEEP MONTANANS WORKING!

+++++

TESTIMONY OF JERRY STINSON, OWNER
BIG SKY BROKERAGE - GREAT FALLS, MT
BEFORE SENATE TAXATION COMMITTEE
ON APRIL 10, 1991
REGARDING HOUSE BILL 1012

+++++

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: AS PART OWNER IN BIG SKY BROKERAGE, I AM VERY CONCERNED ABOUT HOUSE BILL 1012. AS A FOOD BROKER IN THE STATE OF MONTANA, ONE OF THE MANUFACTURERS WE REPRESENT IS LIGGETT & MYERS TOBACCO. WE HAVE REPRESENTED LIGGETT & MYERS TOBACCO FOR APPROXIMATELY 8 YEARS AND THE RESERVATION SUNDRY SHOPS IN MONTANA REPRESENT APPROXIMATELY 20% OF OUR TOTAL CIGARETTE BUSINESS. THE RESERVATION SMOKE SHOPS DO NOT HAVE TO BUY CIGARETTES FROM JOBBERS/WHOLESALERS IN THE STATE OF MONTANA. THEY BASICALLY CAN BUY CIGARETTES FROM ANYONE OR WHEREVER THEY CHOOSE. IF THIS BILL PASSES, IT WILL FORCE THE RESERVATION SMOKE SHOPS TO BUY OUT-OF-STATE AND WILL FORCE BIG SKY BROKERAGE TO LAY OFF APPROXIMATELY 2 FULL TIME AND 1 PART-TIME EMPLOYEES.

.....

WRITTEN TESTIMONY OF ERIC F. KAPLAN, ATTORNEY
BEFORE THE SENATE TAXATION COMMITTEE
ON APRIL 10, 1991
REGARDING HOUSE BILL 1012

.....

The United States Supreme Court has considered on several occasions whether or not a state may tax sales of various products, including cigarettes, made by Indians to non-Indians. The Court has consistently held that such taxes will be upheld only if they impose no requirements on those who trade with the Indians, such as cigarette wholesalers, and only if they require little more of the retailer than simply collecting the tax from non-Indians. Under these standards, HB 1012 appears to be unconstitutional.

The only tax systems that have been approved by the Supreme Court involving sales of cigarettes by Indians to non-Indians have required the retailer "simply to add the tax to the sales price" and collect it from the non-Indians. Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 483 (1975). The Court has consistently stated that it would allow only such "minimal burdens" to be placed on Indian retailers. See, e.g., Oklahoma Tax Commission v. Potawatomi Tribe, ____ U.S. ____, 111 S.Ct. 905, 911 (1991).

The New York Supreme Court, based on decisions of the U.S. Supreme Court, very recently struck down as unconstitutional a cigarette tax that appears to be identical to HB 1012. The Court held that "the tax scheme under review here fails because it imposes some burdens, although only minimal, on the Indian trader" Milhelm Attea & Bros. v. Department of Tax, 564 N.Y.S. 2d 491, 494 (1990).

Milhelm relied largely on Herzog v. State, 69 N.Y. 2d 536 (1987), aff'd, 72 N.Y. 2d 720 (1988). Herzog, struck down a state tax on reservation motor fuel sales which, like HB 1012, involved a refund system for sales to Indians. In holding the tax unconstitutional, the Court, citing Moe, supra, stated that

The Supreme Court has drawn a clear distinction between State taxation schemes which merely require Indian retailers to collect a valid tax on non-Indian purchases and those that burden persons engaged in trade with Indians on reservations.

69 N.Y. 2d at 544.

Herzog relied largely on the U.S. Supreme Court decision in Central Machinery v. Arizona, 448 U.S. 160 (1979). In Central Machinery, the Court ruled that Arizona could not impose a tax on the sale of tractors where the sale was made by a non-Indian to Indians on the reservation. The Court held that "federal law pre-empts the asserted state tax." Id. at 165.

HB 1012 is unconstitutional on two separate grounds. First, it requires the Indian retailer to do more than the "minimal burden" of simply collecting the tax from non-Indians. For example, the retailer must, in effect, obtain state approval of his order before it is filled. Only if his order is within that month's quota will it be filled. The Bill provides that all taxes "must be pre-collected by the wholesaler", presumably, from the retailer. Thus, the retailer may be faced with the additional burden of having to advance taxes and wait for a refund, although the Bill is unclear in this regard.*

The Bill is also unconstitutional because it imposes requirements on the wholesalers who trade with the Indian retailers in direct contravention of Central Machinery. This attempted regulation is far-reaching. The wholesaler must obtain prior approval of any sale it makes to the reservation. He must also advance the tax money to the State and wait for a refund from the State. The wholesaler must apply for his refund within an undefined amount of time "or the credit or refund is lost." The wholesaler must provide proof of order and delivery to exempt retailers in order to obtain a credit or refund. Additionally, the wholesaler must certify to the Department of Revenue that the economic benefit for the credit or refund has been passed on to the retailer. It should be emphasized that, under Central

* At least three provisions of the Bill also suggest that the retailer may have to collect the tax directly from the Indian customer and refund it to him or her at a later point. Section 3(3) states that "the tax imposed by this section must be pre-collected . . . on all cigarettes entering Montana Indian reservations." Does this include sales to Indians? Section 2 states that "except for cigarettes sold on military reservations, all cigarettes sold in Montana must have a Montana cigarette tax stamp affixed prior to sale." Does this include sales to Indians? Finally, Section 3(4) refers to "taxes pre-collected on cigarettes sold by the retailers to members of an Indian tribe." If the retailer is supposed to collect the tax from the Indian, than this is clearly illegal under many Supreme Court decisions. Moreover, it would place an extreme burden on the retailer to require him to rebate tax payments to numerous individual Indian purchasers. If the intent is not for the Indian customer to pay the tax, the bill is, at best, ambiguous.

Machinery, and its progeny, the State can impose no regulations or requirements upon those who trade with Indians.

In light of the above, HB 1012 is apparently unconstitutional on two separate grounds - - it places on the retailer more than the "minimal burden" of simply collecting the tax from non-Indians and it imposes requirements on the wholesalers who trade with Indians, contrary to Federal Constitutional law.

NEW YORK SUPREME COURT—
APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

MILHELM ATTEA & BROTHERS, INC. v.
DEPT. OF TAXATION & FINANCE OF THE
STATE OF NEW YORK, et al.

No. 60199 (N.Y. Sup. Ct., App. Div., Dec. 6, 1990)

Summary

Plaintiffs, wholesale dealers of cigarettes, challenge cigarette sales tax regulations promulgated by the state of New York which: (1) allow wholesalers to purchase, tax free, a quantity of cigarettes determined by the State Department of Taxation and Finance to be the amount needed to supply the personal needs of Indian consumers, (2) impose record-keeping requirements on wholesalers, and (3) may require applications for refunds for exempt sales upon which tax was prepaid; and seek a declaratory judgment that the regulations are invalid and an injunction against their enforcement. The court granted plaintiffs' motion for a preliminary injunction restraining enforcement of the regulations and plaintiffs' motions for summary judgment. Defendants appealed.

Citing its reasoning in *Herzog Bros. Trucking v. State Tax Commission*, 69 N.Y.2d 536, and again considered (72 N.Y.2d 720) upon remand from the U.S. Supreme Court (*State Tax Comm'n of State of New York v. Herzog Bros. Trucking*, 487 U.S. 1212), the court of appeals affirms the grant of plaintiffs' motion for summary judgment.

Full Text

Before WEISS, Presiding Justice, and MIKOLL, LEVINE, MERCURE and HARVEY, Associates Justices
MIKOLL, Associate Justice

Plaintiff in action no. 1, Milhelm Attea & Brothers, Inc. (hereinafter Attea Brothers), a wholesale dealer of cigarettes licensed under Tax Law § 480, is a New York corporation with its principal place of business in Erie County. Almost 75 percent of its sales are to Indians on Indian reservations in New York. Plaintiff in action no. 2, Elias H. Attea, Jr., also sells cigarettes wholesale to Indians on Indian reservations in New York.

The Tax Law imposes a cigarette tax on all cigarettes possessed in this state for sale "except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax" (Tax Law § 471(1)). Sales of cigarettes on Indian reservations to Indians for personal consumption are exempt from state taxation (20 NYCRR 335.5(2)). Pursuant to regulations applicable to sales made after January 1, 1989, a tax is imposed on cigarettes sold at wholesale to Indians on Indian reservations for retail sale to non-Indians (see 20 NYCRR 331.4, 331.5, 331.6, 331.7, 331.8, 331.9, 331.10, 335.5). Wholesalers may purchase, tax free, a quantity of cigarettes determined by defendant Department of Taxation and Finance (hereinafter the Department) to be the amount needed to supply the personal needs of the Indian consumers (20 NYCRR 335.5). Thus, the quantity of tax-free cigarettes which may be sold by the wholesalers is limited (20 NYCRR 335.5(e)). Further, record-keeping requirements are imposed on the wholesalers (see, e.g., 20 NYCRR 337.3) and applications for refunds for exempt sales upon which the tax was prepaid may be necessary (see, e.g., 20 NYCRR 340.1).

Plaintiffs commenced the instant declaratory judgment actions seeking to have the new regulations declared invalid and to enjoin their enforcement. Subsequently, both plaintiffs moved for a preliminary injunction restraining enforcement of the new regulations. The motions were granted. Thereafter, motions were made by the respective parties for summary judgment. Supreme court granted plaintiffs' summary judgment motions for the relief demanded in the complaint and denied defendants' cross-motions. The court also permanently enjoined defendants from, *inter alia*, enforcing the regulations. This appeal by defendants ensued.

The issues presented here are similar to those considered by the court of appeals in *Herzog Bros. Trucking v. State Tax Comm'n* (69 N.Y.2d 536 [14 Indian L. Rep. 5051]) and again considered by that court (72 N.Y.2d 720 [16 Indian L. Rep. 5003]) upon remand from the United States Supreme Court (*State Tax Comm'n of State of N.Y. v. Herzog Bros. Trucking*, 487 U.S. 1212). As here, the plaintiff in *Herzog* was a wholesaler selling a product, in that case motor fuel, to Indians on a reservation who then sold it at retail to Indian and non-Indian consumers. There, the wholesaler was to collect the fuel tax upon the first sale and the tax was then included in the retail price and passed on to the ultimate consumer (see *Herzog Bros. Trucking v. State Tax Comm'n*, 72 N.Y.2d 720, 723, *supra*). A refund or credit was made where the ultimate consumer was an Indian (*id.*). When the court of appeals initially heard the case, it reversed this court's decision which had found the tax scheme valid (*Herzog Bros. Trucking v. State Tax Comm'n*, 69 N.Y.2d 536, *supra*, rev'g, 122 A.D.2d 518). The court of appeals at that time held that:

... Congress has preempted the field of regulating trade with Indians on reservations and has left "no room" for the application of supplementary State tax laws, such as the one here at issue, that impose "additional burdens" on Indian traders. . . . Thus, no matter how minimal the burden imposed on the motor fuel taxation scheme on [the plaintiff], as a trader to the Seneca Nation, such regulation is preempted by the Federal Indian trader laws. . . (*id.*, at 546 [citation omitted]).

the first *Herzog* case went to the United States Court, the case was remanded (*State Tax Comm'n of N.Y. v. Herzog Bros. Trucking*, 487 U.S. 1213, 5 the court of appeals to consider the effect of the fuel tax scheme contained in newly enacted regulations effective November 30, 1988 and applicable to sales made on or after January 1, 1989. Those regulations differed from the ones originally in issue (*Herzog Bros. Trucking v. State Tax Comm'n*, 69 N.Y.2d 536, *supra*), but are substantially similar to those at issue in the instant case. The regulations originally in issue in *Herzog* required the wholesaler to prepay tax on all fuel sold and apply for a refund or credit of tax where the ultimate sale was tax exempt. During the pendency of *Herzog*, the Department published for comment regulations which, like the regulations now before the court, provided for preapproval of tax-free sales to Indians at registered dealers. No tax was to be paid on fuel designed for such sales at any point in the transaction (20 NYCRR 414.7[a][3]). The amount of fuel which would be allowed for tax-free sale was set by the Department on the basis of projected Indian consumption (20 NYCRR 414.7[a][2]; [b]). On remand from the United States Supreme Court for consideration of the case in light of the newly published regulations, the court of appeals refused to review the constitutionality of those regulations, reasoning that to do so would be to render an advisory opinion (*Herzog Bros. Trucking v. State Tax Comm'n*, 72 N.Y.2d 720, 725, *supra*).

The court is now called upon to address the constitutional issue of similar regulations. When the court of appeals heard the case on remand, it referred to its analysis of the case law in issue in the first *Herzog* case and opined that "[i]n the event of a reversal by the Supreme court, we assume that our interpretation of those decisions and our application of them to the facts before us represents the present state of the law on the subject" (*id.* at 724-25). Accordingly, the tax regulation under review here fails because it imposes some burden, although only minimal, on the Indian trader contrary to the court of appeals' interpretation of the applicable Supreme Court decisions (see *id.*, see also *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 690; *Herzog Bros. Trucking v. State Tax Comm'n*, 69 N.Y.2d 536, 546, *supra*).

We note that this court's decision in *Matter of De Loronde v. New York State Tax Comm'n* (142 A.D.2d 90, *appeal dismissed, lv denied*, 73 N.Y.2d 936) [16 Indian L. Rep. 5001] was rendered November 23, 1988 without the benefit of the court's opinion on remand in *Herzog*, which was rendered December 1988.

Decision by MIKOLL, J., in which WEISS, J.P., LEVINE, J.P., CURE and HARVEY, JJ., concur.
Order and judgment affirmed, with costs.

Counsel for appellants: Robert Abrams, Att'y Gen., New York City, New York

Counsel for respondent: Kavinoky & Cook, Buffalo, New York; Williams, Stevens, McCarville & Frizzell, Buffalo, New York

SENATE TAXATION

COMMITTEE NO. 32

TESTIMONY OF EVELYN M. STEVENSON DATE 4/10/91
TRIBAL ATTORNEY FOR THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD RESERVATION
ON HOUSE BILL 1012
BEFORE THE SENATE TAXATION COMMITTEE
APRIL 10, 1991

Good morning Mr. Chairman; members of the Committee. My name is Evelyn Stevenson, Tribal Attorney for the Confederated Salish and Kootenai Tribes of the Flathead Reservation. For over 17 years, I've followed the Indian cigarette tax issue. My purpose here today is to briefly relay the position of the Tribal Council. The immediate problem with the Bill is one of timing. If the Bill goes into effect July 1 of this year, there is no time to work with the State on a joint policy. If, however, enactment were delayed until July 1 of next year, the transition would be simplified. The early date would impose irreparable harm on the Indian businesses now and would make it difficult to revitalize their operations later.

In the past when I've appeared before the Montana Legislature, the discussion has been similar--the potential loss of revenue to the State for sales of cigarettes to non-Indians on the Reservation. The State and the Tribes have compared those estimated figures to several other considerations--including a balance against all of the many other State taxes which Indians are now paying which they should not, by law, be paying. Some tourists also come to Montana to visit the Reservations and are attracted to lower cost cigarettes, but at the same time, they stay and spend monies in other businesses. So there are significant pluses for our communities that would be directly or

P. 3
Testimony HB1012
4-10-91

purchases from the wholesalers would go through the Tribes and the Tribes would collect a 1-1/2% administrative fee on the total amount. There has not been an official Tribal statute in place, however, to mandate that all purchases would channel through the Tribes nor have there been any specific rules or regulations. The Council has now mandated the Legal Department to draft those internal controls and procedures and to monitor compliance as a cost of government.

Obviously, the concern which this Committee has turns on sales to non-Indians and the Smoke Shops, thereby, marketing a tax benefit. That's a legitimate concern but you do need to question how much of that business would even come into Montana from out of State tourists or Canadians if the benefit weren't here and you need to think about other monies those visitors are spending while on the Reservations or travelling through Montana to get to the Reservation. Montana itself, for example, markets a tax benefit whenever the State advertises that Montana doesn't have a sales tax like those State surrounding us. Nearly every legislative session, Montana weighs and balances all of the political and economic facets regarding the pros and cons of a sales tax.

House Bill 1012, as originally drafted, had areas where we could see real legal and administrative problems that could prove costly and time-consuming in the implementation of the Act.

P. 4
Testimony HB1012
4-10-91

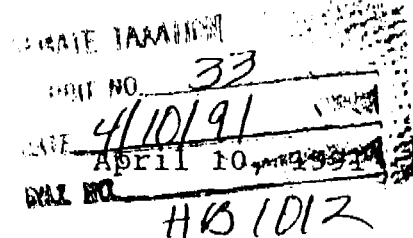
The proposed amendments cure some of those, but raise some new questions. Most important is that without enforcement cooperation from the Tribes, meaningful implementation is going to be difficult. Also, as stated, Reservation businesses may close down between the time this law goes into effect and negotiations are completed with the Department of Revenue. The Tribes need to know as well whether Montana is prepared to act immediately regarding other areas of taxation or will litigation become a reality?

The Bill excludes the Military Base which raises a question of equality. Although I don't know the present figures, when we reviewed this before, every airman was smoking around 17 packs a day. So clearly there are some non-military civilians getting a tax break that wasn't intended for them.

Two years ago, the Salish-Kootenai Tribes proposed that the State and the Tribes meet and come up with possible resolutions. But in the two-year interim, we've not heard from Revenue. Therefore, I'm suggesting that this Legislative Body now pass only that portion of HB 1012 which mandates the State to sit down and negotiate in good faith with Indian leaders to work on cigarette taxes as well as the other areas taxation and to delay the effective date on levy to the tax until next year. To these aims, an impartial arbitrator could facilitate the process. H.B. 1012 does need more thought and study and I urge you not to

P. 5
Testimony HB1012
4-10-91

impose a tax law until the Tribes have been made a part of the consultative process. The process should be turned around so that no action goes into affect until after negotiation arbitration is completed rather than at the outset. Thank you.



Mr. Chairman and members of the Senate Taxation Committee:

My name is Tom Ault. I own and manage a small candy and tobacco wholesale business in Wolf Point, Montana. We service North-Eastern Montana. I have done this for the past 15 years.

When I started in the tobacco business, Montana wholesalers could not sell unstamped cigarettes to Indian smokeshops. The smokeshops were there, but the cigarettes were being shipped in from out-of-state and sold untaxed. Montana wholesalers did not sell the untaxed cigarettes, but they were still sold; most came from the State of Washington.

Approximately 10 years ago, the law as changed to give Montana wholesalers the opportunity to compete for these sales. Montana wholesalers could now make the wholesale deliveries of products that previously were being shipped in from out-of-state and not helping the Montana economy.

HB1012 will revert to an advantage for out-of-state businesses. HB1012 controls the number of unstamped cigarettes a Montana wholesaler can sell to smokeshops. We will have quotas we can sell. When the quotas are met, there will still be a demand for cigarettes. This demand will be met by out-of-state wholesalers. The Department of Revenue can control the in-state wholesaler, but cannot control wholesalers in other states. These untaxed cigarettes will still be sold. Every U-Haul or Ryder truck, and every semi-trailer cannot be stopped and searched for unstamped cigarettes. The business will still be there for out-of-state wholesalers, but not Montana wholesalers.

This bill is bad for Montana business. It will force Montana smokeshops to do business with out-of-state wholesalers.

I urge you to vote against House Bill 1012. Thank you.

Tom Ault, Owner/Manager
Hi-Line Wholesale
Wolf Point, Montana

Testimony of Binky Hall, Owner
Joe's Jiffy Stop - Pablo, Montana
Before the Senate Taxation Committee
April 10, 1991
Regarding House Bill 1012

Mr. Chairman and Members of the Committee: I am the sole proprietor of Joe's Jiffy Stop. We are a convenience store located in Pablo, Montana, across Highway 93 from the tribal complex of the Confederated Salish and Kootenai Tribes.

In the seven years I have owned the store, we have progressively put the bulk of our profits into the growth of our business and the betterment of our community.

In 1990, I secured a guaranteed loan for nearly 1/2 million dollars to build a new building and upgrade our gasoline facility to EPA regulations.

I employ 19 people not counting myself or my teenage sons. Our payroll runs approximately \$6,000 per 2 week pay period. Of these 19 employees, only 1 besides myself is a tribal member and she is awaiting a job at the tribal natural resources department. These people are mostly single parents, who are the sole support of their families. I feel that at least 1/4 of them would be on welfare were they not working.

Since cigarettes are a definite 20% of our sales and off-shoot sales could add another 20%, I would be in a position to lay off 20-40% of my employees and the direct effect of that would filter out into our small community in greater and greater waves.

In the even this bill were to pass, I would have to try to find some sort of product that would fill that portion of my sales or I would be forced to declare bankruptcy, and closure causing more economic hardship in my area.

I feel our sales do not hurt the State of Montana, but cause a drawing card that is beneficial to our area.

RANDE WALTON
TINA MARIE'S SMOKE SHOP - RONAN, MONTANA
APRIL 10, 1991

EXHIBIT NO 35
DATE 4/10/91
BILL NO HB-1012

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE: MY NAME IS RANDE WALTON. MY WIFE, TINA, OWNS AND OPERATES TINA MARIE'S SMOKE SHOP, A SMALL BUSINESS WHICH EMPLOYS 9 PEOPLE, 8 OF WHICH ARE NON-TRIBAL MEMBERS. OF THAT 9, 5 ARE DIRECTLY OFF THE WELFARE ROLLS AND ARE NOW ON THE TAX ROLLS, WHICH CERTAINLY LEADS TO A MORE PRODUCTIVE PERSON IN OUR COMMUNITY.

DUE TO OUR SMALL BUSINESS, WE HAVE 29 MONTHLY ACCOUNTS FOR GOODS AND SERVICES, WHERE THE MONEYS ARE MOSTLY PAID BACK INTO OUR OWN ECONOMY.

DUE TO THE CURRENT SITUATION ON TRIBAL CIGARETTES, WE EMPLOYE THESE 9 PEOPLE AND OUR DAY TO DAY BUSINESS CARRIES ON. IF THIS BILL PASSES, WE SURELY WOULD NOT NEED 9 EMPLOYEES. 3 OR 4 WOULD BE THE MOST IT WOULD TAKE TO OPERATE THE BUSINESS AND THE FUTURE OF THIS STORE WOULD BE ON THE LINE.

MY WIFE, BEING A TRIBAL MEMBER ON THIS RESERVATION, COULD PUT ALL OUR PERSONAL PROPERTY IN TRUST, PAYING NO STATE TAX. WE HAVE NOT AND DO NOT ELECT TO DO THIS. WE PAY PERSONAL PROPERTY TAX AS ANY NON-TRIBAL MEMBER DOES.

I PERSONALLY HAVE WORKED CONSTRUCTION AND OIL FIELDS OVER THE LAST 12 YEARS. THE MONEYS THAT I'VE USED FOR MY DOWN PAYMENTS AND OPERATING CAPITAL CAME MOSTLY FROM ALASKA AND NORTH DAKOTA DUE TO THE SITUATION IN MONTANA IN THOSE TWO TRADES.

WE ARE CURRENTLY 4 YEARS INTO A 10-YEAR NOTE ON OUR BUSINESS AND 19 YEARS OUT ON MY HOME LOAN. WE FIND IT HARD TO BELIEVE THAT I WOULD HAVE TO RESORT BACK TO MY OLD JOBS TO BE ABLE TO LIVE IN MONTANA. AS FOR THE 9 EMPLOYEES, I GUESS IT'S BACK TO THE WELFARE LIVES.

GENTLEMEN, THIS BILL DOES NOTHING FOR MY FUTURE IN MONTANA. I ASK FOR YOUR OPPOSITION TO HB1012. THANK YOU.

Written Testimony

House Bill 1012 - Senate Taxation Committee

April 10, 1991

Mr. Chairman, members of the committee, for the record, my name is Mike Parker. I am president of Pennington's, Inc. of Great Falls, Shelby and Havre. I am writing to testify against House Bill 1012, in its present form.

I respect the rights of Native Americans to buy and possess tax-free cigarettes for their own use; I am, however, opposed to the possession and use of tax-free cigarettes off the reservation by non-Indians.

However well-intended, House Bill 1012, in its present form, is seriously flawed and deserves your vote of do not pass.

This Bill contains no provisions for enforcement and penalties beyond present levels, which are admittedly inadequate. There are no monetary or criminal penalties for offending consumers, wholesalers, or retailers and there is no provision to increase the Department of Revenue budget to provide for additional enforcement personnel.

The Bill singles out Indian sales, but does not address a similar situation which arises from the availability of tax-free cigarettes on Military reservations. The Department of Revenue will acknowledge that apparent military per capita consumption of cigarettes, sold to the commissary and exchange at Malmstrom Air Force Base near Great Falls, greatly exceeds per capita consumption of the Montana population in general. Tax-free cigarettes are available not only to active duty military personnel, but are available as well to Guardsmen and Reservists. Friends, relatives and customers have related stories to me personally regarding their purchase and/or use of tax-free military cigarettes.

The Bill encourages dialogue with the Indian tribes and their involvement in the implementation of the program proposed by the Bill. It should also encourage dialogue and the involvement of the U.S. Government Bureau of Alcohol, Tobacco and Firearms, Federal Bureau of Investigations, and the U.S. Military authorities.

As provided in the Bill, proportionate reduction of quotas at the time for reporting are unworkable. Quota sales must be allowed on a first come, first served basis prior to sale with the Department of Revenue maintaining quota records. Proportionate reductions after the fact would cause retailers and wholesalers who initially

sell at reduced prices to lose a great deal of money if quotas are actually exhausted prior to the end of a month, but not determined until the fifteenth of the following month.

Montana wholesalers were once denied the opportunity to sell tax-free tobacco products to Indian buyers. The law was changed several years ago to provide a level playing field for Montana businesses. The existing sales opportunity, if denied Montana businesses, will again be exploited by out-of-state and intertribal suppliers. Nothing short of the establishment of a police state, complete with border searches will stop the inflow of untaxed products into the State. Please take care not to simply move the source out of the state and out of mind.

Please seek input from all parties involved in the sales of tax-free cigarettes and defer action until the next legislative session in 1993. If something is to be done, let it be a well-thought-out joint effort.

The program outlined in this Bill is doomed to failure. Please vote "No" on House Bill 1012.

Sincerely,
Mike Parker, President
Pennington's, Inc.

TESTIMONY OF STEVEN SMITH, SALES REPRESENTATIVE
UNITED TRUCK LINES
BEFORE THE SENATE TAXATION COMMITTEE
REGARDING HOUSE BILL 1012

SENATE TAXATION
COMMITTEE NO. 37
DATE 4/10/91
FILED H.B. 1012
APRIL 10, 1991

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: MY NAME IS STEVEN SMITH. I AM A SALES REPRESENTATIVE FOR UNITED TRUCK LINES. WITH THE DECLINE OF WAREHOUSING AND DISTRIBUTION IN OUR STATE, THE TRUCKING INDUSTRY HAS BEEN STRUGGLING. IN THE PAST 10 YEARS, THERE HAVE BEEN FIVE MAJOR INTRASTATE CARRIERS SELLING THEIR AUTHORITY DUE TO THEIR INABILITY TO PRODUCE A PROFIT IN THIS STATE.

ANY FURTHER REDUCTION IN THE MONTANA INTRASTATE FREIGHT WILL PUT A GREATER STRAIN ON A STRUGGLING TRUCKING INDUSTRY. IF WE LOSE THE DISTRIBUTION OF CIGARETTES FROM WITHIN THE STATE OF MONTANA, TO THE INDIAN RESERVATIONS, THEN WE STAND TO LOSE 1,200,000 POUNDS OF FREIGHT ANNUALLY.

WE HAVE MADE A SUBSTANTIAL INVESTMENT IN MONTANA IN TERMS OF TERMINALS, EQUIPMENT, AND PERSONNEL. WE HAVE DONE THIS BECAUSE OF OUR BELIEF IN THE FUTURE OF THIS STATE. A LOSS OF THIS MAGNITUDE WOULD MAKE IT MORE DIFFICULT TO MEET OUR FUTURE RESPONSIBILITIES AND INVESTMENT REQUIREMENTS TO OUR SHIPPING PUBLIC AND CUSTOMERS.

PLEASE VOTE AGAINST HOUSE BILL 1012.

DAVE BAKER, OWNER/PRESIDENT
BILLINGS STORAGE AND WHOLESALE COMPANY
APRIL 10, 1991

SENATE TAXATION

EXHIBIT NO.

38

DATE

4/10/91

BILL NO.

HB 1012

Mr. Chairman and Members of the Senate Taxation Committee:

My name is David Baker. I am the President and owner of Billings Storage and Wholesale Company, in Billings, Montana. We are a general commodity wholesale and distribution center that has been under the same family ownership for 47 years. Among our clients are the tobacco companies. For them we provide wholesale and distribution services for all of Montana and parts of Idaho and Wyoming.

An important portion of the tonnage that we handle annually is that which goes to the various Indian reservations in the State. As has been testified, this amounts to approximately 32,000 cases annually. At 35 pounds per case, this comes to approximately 1,200,000 pounds of tonnage that we stand to lose as a result of this legislation. This large potential tonnage loss will force us to reduce our work force accordingly. With the general softness that currently exists in the Montana economy, there is little or no opportunity for us to replace this tonnage. As a result, we will immediately begin to reduce our work force.

I would also like to add that the current transportation environment is highly conducive to transporting commodities into the area from out-of-state. Currently, 40 to 60% discounts are routinely given on tonnage coming into this state from out-of-state locations. As a result, cigarettes purchases can easily be made

out-of-state and transported into the area to the detriment of a number of Montana businesses.

If this legislation is passed, a large portion of businesses and more importantly, jobs and revenue, currently being enjoyed by a large variety of Montana businesses will be lost. It seems to me also that anticipated revenues to the state will not be gained. The results will all be to the detriment of businesses like myself, Montana wholesalers, and Montana truckers. Also, once lost, it will be gone forever. As a concerned businessman and taxpayer, I urge you to vote against House Bill 1012.

Thank you.



The United States Law Week

STATE LAW LIBRARY

MAR 06 1991

SENATE TAXATION

EXHIBIT NO. 40

Extra Edition No. 1

Supreme Court
Opinions BB 1012

February 26, 1991

THE BUREAU OF NATIONAL AFFAIRS, INC., WASHINGTON, D.C.

Volume 59, No. 33

OF MONTANA

OPINIONS ANNOUNCED FEBRUARY 26, 1991

The Supreme Court decided:

Full Text of Opinions

COURTS AND PROCEDURE—Sanctions

No. 89-1322

Fed.R.Civ.P. 11, which provides that "signature of an attorney or party constitutes a certificate by the signer . . . that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry [the pleading, motion, or other paper] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law," imposes objective standard of reasonable inquiry on represented parties who sign pleadings, motions, or papers; so construed, Rule 11 has no more than incidental effect on substantive rights of parties and thus does not violate Rules Enabling Act, either by authorizing fee shifting in manner not approved by Congress or by effectively creating federal tort of malicious prosecution that encroaches on state law causes of action. (*Business Guides Inc. v. Chromatic Communications Enterprises Inc.*, No. 89-1500) . Page 4144

OKLAHOMA TAX COMMISSION, PETITIONER v. CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

Syllabus

No. 89-1322. Argued January 7, 1991—Decided February 26, 1991

Although, for many years, respondent Indian Tribe has sold cigarettes at a convenience store that it owns and operates in Oklahoma on land held in trust for it by the Federal Government, it has never collected Oklahoma's cigarette tax on these sales. In 1987, petitioner, the Oklahoma Tax Commission (Oklahoma or Commission), served the Tribe with an assessment letter, demanding that it pay taxes on cigarette sales occurring between 1982 and 1986. The Tribe filed suit in the District Court to enjoin the assessment, and Oklahoma counterclaimed to enforce the assessment and to enjoin the Tribe from making future sales without collecting and remitting state taxes. The court refused to dismiss the counterclaims on the Tribe's motion, which was based on the assertion that the Tribe had not waived its sovereign immunity from suit. The court held on the merits that the Commission lacked authority to tax on-reservation sales to tribal members or to tax the Tribe directly, and therefore that the Tribe was immune from Oklahoma's suit to collect past unpaid taxes directly, but that the Tribe could be required to collect taxes prospectively for on-reservation sales to nonmembers. The Court of Appeals reversed, holding, *inter alia*, that the lower court erred in entertaining Oklahoma's counterclaims because the Tribe enjoys absolute sovereign immunity from suit and had not waived that immunity by filing its action for injunctive relief, and that Oklahoma lacked authority to tax any on-reservation sales, whether to tribesmen or nonmembers.

Held: Under the doctrine of tribal sovereign immunity, a State that has not asserted jurisdiction over Indian lands under Public Law 230 may not tax sales of goods to tribesmen occurring on land held in trust for a federally recognized Indian tribe, but is free to collect taxes on such sales to nonmembers of the tribe.

(a) The Tribe did not waive its inherent sovereign immunity from suit merely by seeking an injunction against the Commission's proposed tax assessment. *United States v. United States Fidelity and Guaranty Co.*, 309 U. S. 506, 511-512, 513. In light of this Court's reaffirmation, in a number of cases, of its longstanding doctrine of tribal sovereign immunity, and Congress' consistent reiteration of its approval of the doctrine in order to promote Indian self-government, self-sufficiency, and economic development, the Court is not disposed to modify or abandon the doctrine at this time. Nor is there merit to Oklahoma's contention that immunity should not apply because the Tribe's cigarette sales do not occur on a formally designated "reservation." Trust land qualifies as a reservation for tribal immunity purposes where, as here, it has been "validly set apart for the use of the Indians as such, under the superin-

NATIVE AMERICANS—Tribal Immunity

Federally recognized Indian tribes enjoy tribal sovereign immunity from state taxation on sales of goods to tribal members that occur on reservation or trust lands, but not on such sales to non-tribal members. (*Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, No. 89-1322) Page 4137

POSTAL SERVICE—Postal Monopoly

Postal workers adversely affected by Postal Service's international remailing rule, which suspends operation of private express statutes so as to allow use of private couriers to deposit with foreign postal services letters destined for foreign addresses, are not within zone of interests encompassed by private express statutes and therefore lack standing to challenge validity of rule. (*Air Courier Conference of America v. American Postal Workers Union*, No. 89-1416) Page 4140

NOTICE: These opinions are subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released *** at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

EXECUTIVE ACTION ON HOUSE BILL 1012Amendments, Discussion, and Votes:

Eddye McClure, Legislative Council, presented proposed amendments to the committee (Exhibits #1 and #1a). She explained amendments #1a are modeled after SB 428 and would require the tax to be collected and negotiations to take place between the tribes and the state and establishing an immediate effective date. The amendments #1 would mandate negotiations between the tribes and the state and a report to the interim Committee on Indian Affairs before the tax is implemented and collected.

Senator Harp and Senator Towe said it is not reasonable to start collecting the tax and then negotiate the collection.

Senator Harp said a compromise was reached based on similar language in gas and severance tax bills. He said people are deliberately evading taxes and the situation needs to be brought under control.

Representative Elliott said the method used to collect taxes on non-Indians is being negotiated the first year. These people are already evading the tax. He said he would support the amendment.

The motion to adopt the amendments (#1a) FAILED on a roll call vote (attached).

Senator Harp moved to adopt the amendments as per Exhibit #1b (amendments numbered 101202).

The motion CARRIED unanimously.

Recommendation and Vote:

Senator Harp moved HB 1012 Be Concurred In As Amended.

The motion CARRIED unanimously.

EXECUTIVE ACTION ON HOUSE BILL 973Motion:

Senator Brown moved to Reconsider action on HB 973.

The motion CARRIED unanimously.

GRAY BILL
Amendments HR 101201

REQUIRING THE DEPARTMENT OF REVENUE TO PROVIDE
A MECHANISM FOR REVENUE SHARING WITH A TRIBAL
GOVERNMENT THAT HAS ENACTED A CIGARETTE TAX
IDENTICAL TO THAT IMPOSED BY THE STATE;
HOUSE BILL NO. 1012

INTRODUCED BY ELLIOTT

BY REQUEST OF THE HOUSE TAXATION COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT TO-APPLY APPLYING THE
CIGARETTE SALES TAX TO ALL USE AND CONSUMPTION OF CIGARETTES
ON AN INDIAN RESERVATION EXCEPT BY MEMBERS OF AN INDIAN
TRIBE ON AN INDIAN RESERVATION; PROVIDING FOR A REFUND OF OR
CREDIT FOR TAXES PAID ON CIGARETTES SOLD TO TRIBAL MEMBERS;
PROVIDING AN INCREASE IN THE APPROPRIATION TO THE DEPARTMENT
OF REVENUE FOR FISCAL ~~YEARS 1992 AND~~ ^{YEAR} 1993 TO ADMINISTER
COLLECTION OF CIGARETTE TAXES; PROVIDING A CIVIL PENALTY FOR
THE POSSESSION OF UNSTAMPED CIGARETTES; REQUIRING A REPORT
TO THE 53RD LEGISLATURE; AMENDING SECTION SECTIONS
16-11-111, 16-11-113, 16-11-119, 16-11-131, AND 16-11-133,
MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE, AN
APPLICABILITY DATE, AND A TERMINATION DATE."

WHEREAS, the Legislature proposes to eliminate unfair
competitive business advantages now enjoyed by retailers
operating on Indian reservations in direct competition with
businesses operated off the reservations by requiring that
cigarettes sold to non-Indian purchasers on an Indian
reservation have a Montana cigarette tax stamp affixed even
if sold by an Indian retailer; and

WHEREAS, the Legislature also recognizes that Indian
tribes in Montana also view certain state taxes being
assessed against the tribes and tribal members on the
reservation, including fuel and alcohol taxes, as being
unlawful; and

WHEREAS, although the Legislature proposes to exercise
its constitutional authority to seek assistance from tribal
authorities in collecting cigarette taxes from non-Indians
on the reservations, it also recognizes the need for
discussion and negotiation with Indian tribes in Montana to
avoid dual taxation and to develop a comprehensive
resolution of all reservation taxation issues affecting both
the state and the tribes.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Definitions. As used in
[sections 1 through 3], the following definitions apply:

(1) "Indian reservation" means Indian lands federally
declared to be a reservation for an Indian tribe by treaty
between the tribe and any territorial government or state
government or the United States government or established by
acts of the United States congress or by formal decision of
the executive branch of the United States.

(2) "Indian retailer" means a business or enterprise
that is wholly owned and operated by an Indian tribe in

Montana or a business or enterprise that is wholly owned and operated by one or more members of a tribe in Montana on whose reservation the business or enterprise is located.

NEW SECTION. SECTION 2. STAMPS AFFIXED ON ALL CIGARETTES -- EXCEPTION. EXCEPT FOR CIGARETTES SOLD ON MILITARY RESERVATIONS, ALL CIGARETTES SOLD IN MONTANA MUST HAVE A MONTANA CIGARETTE TAX STAMP AFFIXED PRIOR TO SALE.

Section 3. Section 16-11-111, MCA, is amended to read:

"16-11-111. Cigarette sales tax -- EXEMPTION FOR SALES TO INDIANS. There--is--hereby (1) A tax on the purchase of cigarettes for consumption, use, or any purpose other than resale in the regular course of business is levied, imposed, and assessed at the following rate and there shall must be collected precollected by the wholesaler and paid to the state of Montana upon cigarettes sold or possessed in this state the following excise tax which shall be paid prior to the time of sale and delivery of cigarettes: 18 cents on each package containing 20 cigarettes and, when packages contain more or less than 20 cigarettes, then a tax on each cigarette equal to 1/20th the tax on a package containing 20 cigarettes.

(2) The tax imposed by this section does not apply to cigarettes sold by an Indian retailer to members of a federally recognized Indian tribe within the boundaries of the tribe's reservation located in Montana.

(3) The tax imposed by this section must be precollected, subject to refund or credit as provided in subsection (4), on all cigarettes entering Montana Indian reservations.

(4) Wholesalers PURSUANT TO THE PROCEDURE PROVIDED IN SUBSECTION (5), WHOLESALERS making sales of cigarettes to Indian retailers may apply to the department for a refund of or credit for taxes precollected on cigarettes sold by the retailers to members of an Indian tribe on whose reservation the retail sale is made. The claim for credit or refund must be made on the wholesaler's cigarette tax return for the reporting period immediately following the period during which the cigarettes were sold by the wholesaler to the retailer. If not claimed, the credit or refund is lost.

(5) THE DISTRIBUTION OF TAX-FREE CIGARETTES TO INDIANS MUST BE IMPLEMENTED THROUGH A SYSTEM OF PREAPPROVED, WHOLESALER SHIPMENTS. LICENSED MONTANA WHOLESALERS SHALL CONTACT THE DEPARTMENT FOR APPROVAL PRIOR TO SHIPMENT OF THE UNTAXED CIGARETTES. THE DEPARTMENT MAY AUTHORIZE SALES BASED ON WHETHER THE QUOTA FOR THAT PARTICULAR SERVICE AREA HAS BEEN MET. IF THE SALE IS AUTHORIZED AS TAX EXEMPT, THE WHOLESALER, UPON PROVIDING PROOF OF ORDER AND DELIVERY TO AN EXEMPT RETAILER, MUST BE PROVIDED A CREDIT OR A REFUND. ONCE THE ALLOCATION FOR THE PARTICULAR SERVICE AREA HAS BEEN FILLED, THE DEPARTMENT SHALL IMMEDIATELY NOTIFY ALL

1 WHOLESALERS THAT ALL FURTHER SALES ON THAT RESERVATION MUST
 2 BE TAXED AND THAT CLAIMS FOR REFUND OR CREDIT WILL NOT BE
 3 HONORED FOR THE REMAINDER OF THE MONTH. ALLOCATIONS ARE NOT
 4 TRANSFERABLE BETWEEN MONTHS OR BETWEEN INDIAN RESERVATIONS.

5 (5)(6) The total amount of refunds or credits allowed
 6 by the department to all wholesalers claiming the refund or
 7 credit under subsection (4) for any reporting--period MONTH
 8 may not exceed an amount that is equal to the tax due on the
 9 average individual consumption of cigarettes--determined-in
 10 a-manner-provided-by--department--rule multiplied by the
 11 tribal member population of the reservation on which the
 12 sales are made. THE DEPARTMENT SHALL DETERMINE THE AMOUNT OF
 13 REFUNDS OR CREDITS FOR EACH INDIAN RESERVATION AT THE
 14 BEGINNING OF EACH FISCAL YEAR, USING POPULATION ESTIMATES
 15 AND OTHER DATA ISSUED BY THE UNITED STATES GOVERNMENT. If
 16 the--total--amount-of-refunds-claimed-by-wholesalers-exceeds
 17 the-amount-computed,--the-claims-by-the-wholesalers--must--be
 18 reduced---proportionally---based-on--the--total--amount--of
 19 on-reservation-business-conducted-by-each-wholesaler-to--the
 20 amounts--necessary-to-make-the-total-of-all-the-claims-equal
 21 to-the-allowable-maximum.

22 (6)(7) A refund or credit may not be allowed to a
 23 wholesaler unless the wholesaler certifies to the department
 24 PURSUANT TO 16-11-132(2) that the economic benefit of the
 25 credit or refund has been passed on to the Indian retailers

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

4. Page 6.
 Following: line 8
 Insert: "NEW SECTION. Section 5. Cooperative agreement --
 revenue sharing of cigarette taxes with tribal governments.
 (1) In order to prevent the possibility of dual taxation of
 cigarettes purchased on Indian reservations, the department
 and an Indian tribe may enter into a cooperative agreement.
 The agreement must provide:
 and in section, the

authorities

late-tribal t

1 agreement or proposed legislation to the interim committee
2 on Indian affairs prior to the 53rd legislative session.
3 (2) The legislature also directs the interim committee
4 on Indian affairs to work with the Montana tribal chairman's
5 association, the state coordinator of Indian affairs, and
6 individual tribes to:
7 (a) monitor tax collection made pursuant to 16-11-111;
8 (b) consider alternatives for cigarette tax collection,
9 including possible cooperative agreements to avoid dual
10 taxation by state and tribal governments;
11 (c) identify other unresolved taxation issues,
12 including but not limited to the imposition of fuel and
13 alcohol taxes on Indian reservations, between the state and
14 Montana Indian tribes; and
15 (d) propose legislation to the 53rd legislature that
16 would facilitate a cooperative government-to-government
17 resolution of all Indian reservation taxation issues.
18 SECTION 6. SECTION 16-11-113, MCA, IS AMENDED TO READ:
19 "16-11-113. Tax insignia. (1) Within 72 hours after
20 receipt by the distributor or dealer of any cigarettes,
21 except as hereinafter provided, he shall cause to be
22 securely affixed thereto the required insignia noting the
23 tax thereon. A person specifically exempted under the
24 provisions of 16-11-113(2) may not be considered to be
25 acting unlawfully under this section.

1 (2) Said insignia shall be properly canceled prior to
2 sale or removal for consumption, under such regulations as
3 the department may prescribe.
4 (3) Each package shall have the required insignia to
5 affix thereto in such a manner that the insignia will be
6 destroyed when the package is opened.
7 (4) Wholesalers and retailers licensed under this part
8 may buy, sell, or have in their possession only cigarettes
9 which have the insignia provided for in this part on each
10 package. The insignia provided for in this part shall be
11 sold to and affixed by licensed wholesalers and licensed
12 retailers only.
13 (5) Whenever any cigarettes are found in the place of
14 business of any unlicensed wholesaler, retailer, or other
15 person without the insignia affixed and canceled or not
16 marked as having been received by the unlicensed wholesaler,
17 retailer, or person within the preceding 72 hours, the
18 presumption shall be that such cigarettes are kept therein
19 in violation of the provisions of this part.
20 SECTION 7. SECTION 16-11-119, MCA, IS AMENDED TO READ:
21 "16-11-119. Disposition of taxes — retirement of
22 bonds. (1) Except as provided in subsection (2), all
23 moneys collected under the provisions of 16-11-111, less the
24 expense of collecting all the taxes levied, imposed, and
25 assessed by said section, shall be paid to the state

1 treasurer and deposited as follows: 70.89% in the long-range
2 building program fund in the debt service fund type and
3 29.11% in the long-range building program fund in the
4 capital projects fund type.
5 (2) The following money, collected pursuant to
6 16-11-111, is appropriated to the department:

~~Fiscal year 1992~~ 564,712

8 Fiscal year 1993 56,872

9 **SECTION 8.** SECTION 16-11-131, MCA, IS AMENDED TO READ:

10 "16-11-131. Transporting cigarettes without insignia a

11 misdemeanor. It shall be unlawful for any person to

12 transport into, receive, carry, or move from place to place

13 within this state, except in the course of interstate

14 commerce, any cigarettes which do not bear the insignia

15 required by this part, except for a person specifically

16 exempted in 16-11-132(2). Any person violating the

17 provisions of this section is guilty of a misdemeanor and

18 shall be punished as hereinafter provided."

19 **SECTION 9.** SECTION 16-11-133, MCA, IS AMENDED TO READ:

20 "16-11-133. Sale and use of cigarettes without insignia

21 unlawful. Every person who sells any package of cigarettes

22 which does not bear the insignia required by this part and

23 every person who uses or consumes a cigarette within this

24 state, taken from a package which does not bear the required

25 insignia, is guilty of a misdemeanor and shall be punished

1 as hereinafter provided except that a person specifically
2 exempted under the provisions of 16-11-132(2) may not be
3 considered to be acting unlawfully under this section."
4 **NEW SECTION.** Section 10. Codification through 7
5 section 1-2, AND 4 ARE intended to be
6 codified as an integral part of Title 16, chapter 11, part
7 1, and the provisions of Title 16, chapter 11, part 1, apply
8 to section 1-2, AND 4 through 7
9 **NEW SECTION.** Section 11. Effective date
10 (1) Sections 5-8, as amended, effective July 1, 1993, ON
11 PASSAGE AND APPROVAL AND APPLYING TO SALES MADE BY A
12 ~~PROSECUTOR AFTER JUNE 30, 1991~~

13 **NEW SECTION.** Section 12. Termination.

14 terminates July 1, 1993.

15 ~~Section 8~~

16 ~~Section 8~~

17 ~~Section 8~~

18 ~~Section 8~~

19 ~~Section 8~~

20 ~~Section 8~~

21 ~~Section 8~~

22 ~~Section 8~~

23 ~~Section 8~~

24 ~~Section 8~~

25 ~~Section 8~~

(2) [Sections 1-4 and 9-13
are effective July 1, 1993, and
apply to sales made by the
wholesaler after June 30, 1992.]

E4 # 12

Amendments to House Bill No. 1012
Third Reading Copy (Blue)

Requested by Sen. Harp
For the Senate Committee on Taxation

Prepared by Eddy McClure
April 11, 1991

1. Title, line 10.

Following: line 9

Insert: "REQUIRING THE DEPARTMENT OF REVENUE TO PROVIDE A
MECHANISM FOR REVENUE SHARING WITH A TRIBAL GOVERNMENT THAT
HAS ENACTED A CIGARETTE TAX IDENTICAL TO THAT IMPOSED BY THE
STATE;"

2. Title, line 11.

Following: "FISCAL"

Strike: "YEARS 1992 AND"

Insert: "YEAR"

3. Title, line 16.

Strike: "IMMEDIATE"

Following: "EFFECTIVE"

Strike: "DATE"

Insert: "DATES"

4. Page 6.

Following: line 8

Insert: "NEW SECTION. Section 5. Cooperative agreement --
revenue sharing of cigarette taxes with tribal governments.

(1) In order to prevent the possibility of dual taxation of
cigarettes purchased on Indian reservations, the department
and an Indian tribe may enter into a cooperative agreement.
The agreement must provide:

(a) that under conditions specified in this section, the
state and the tribe will cooperate to collect only one tax that
is at the same level as the tax outside the boundaries of the
reservation and will share the revenue as provided in this
section; and

(b) that the state and the tribe are not forfeiting
any legal rights to apply their respective taxes by entering into
an agreement, except as specifically provided for in the
agreement.

(2) If a tribal government in the state adopts an
ordinance imposing a cigarette tax on cigarettes sold on the
reservation and requires the tax to be paid to the state under
identical terms and conditions as those imposed by the state, the
department shall collect the tax for the tribe. The consumer is
not required to pay both the state tax and the tribal tax but
shall pay only one tax to the state in an amount equal to the tax
paid on cigarettes pursuant to 16-11-111.

(3) After deducting administrative expenses equal to
5% of the amount determined under subsection (2) and the amounts
necessary for refunds, the department shall, on a monthly basis,

distribute the remaining amount to the tribal government.

NEW SECTION. Section 6. Tribal cigarette administration account. (1) There is a special revenue account called the tribal cigarette administration account.

(2) The administrative expenses and refund amounts deducted by the department under [section 5(3)] must be deposited in the tribal cigarette administration account.

(3) The tribal cigarette administration account may be expended by the department only for the purposes of administering the cigarette tax and providing for refunds under [section 5].

NEW SECTION. Section 7. Tribal cigarette tax account. (1) There is a special revenue account called the tribal cigarette tax account.

(2) The tax collected under [section 5], except the administrative expenses and refund amounts deducted under [section 5(3)], must be deposited in the tribal cigarette tax account.

(3) The money in the tribal cigarette tax account must be disbursed on a monthly basis to the tribe, as provided for in the agreement entered into pursuant to [section 5]."

Renumber: subsequent sections

5. Page 6, line 17.

Following: "representatives"

Insert: ", the Montana tribal chairman's association, and the state coordinator of Indian affairs"

6. Page 9, line 7.

Following: line 6

Strike: line 7 in its entirety

7. Page 10, lines 5 and 8.

Following: "4"

Insert: "through 7"

8. Page 10, line 9.

Following: "Effective"

Strike: "date"

Insert: "dates"

9. Page 10, lines 10.

Following: "APPLICABILITY."

Strike: "[This act] is"

Insert: "(1) [Sections 5 through 8 and this section] are"

10. Page 10, lines 11 and 12.

Following: "APPROVAL"

Strike: remainder of line 11 through "1991" on line 12

11. Page 10.

Following: line 12

Insert: "(2) [Sections 1 through 4, 9 through 13 and 15] are effective July 1, 1992, and apply to sales made by the

distribute the remaining amount to the tribal government.

NEW SECTION. Section 6. Tribal cigarette administration account. (1) There is a special revenue account called the tribal cigarette administration account.

(2) The administrative expenses and refund amounts deducted by the department under [section 5(3)] must be deposited in the tribal cigarette administration account.

(3) The tribal cigarette administration account may be expended by the department only for the purposes of administering the cigarette tax and providing for refunds under [section 5].

NEW SECTION. Section 7. Tribal cigarette tax account. (1) There is a special revenue account called the tribal cigarette tax account.

(2) The tax collected under [section 5], except the administrative expenses and refund amounts deducted under [section 5(3)], must be deposited in the tribal cigarette tax account.

(3) The money in the tribal cigarette tax account must be disbursed on a monthly basis to the tribe, as provided for in the agreement entered into pursuant to [section 5]."

Renumber: subsequent sections

5. Page 6, line 17.

Following: "representatives"

Insert: ", the Montana tribal chairman's association, and the state coordinator of Indian affairs"

6. Page 9, line 7.

Following: line 6

Strike: line 7 in its entirety

7. Page 10, lines 5 and 8.

Following: "4"

Insert: "through 7"

8. Page 10, line 9.

Following: "Effective"

Strike: "date"

Insert: "dates"

9. Page 10, lines 10.

Following: "APPLICABILITY."

Strike: "[This act] is"

Insert: "(1) [Sections 5 through 8 and this section] are"

10. Page 10, lines 11 and 12.

Following: "APPROVAL"

Strike: remainder of line 11 through "1991" on line 12

11. Page 10.

Following: line 12

Insert: "(2) [Sections 1 through 4, 9 through 13 and 15] are effective July 1, 1992, and apply to sales made by the

wholesaler after June 30, 1992.

12. Page 10, line 13.

Following: "Termination."

Strike: "[This act]"

Insert: "[Section 8]"

52nd Legislature

HB 1012/02

REQUIRING NEGOTIATIONS BETWEEN THE STATE
AND TRIBAL GOVERNMENTS FOR COLLECTION OF A
CIGARETTE SALES TAX FROM NON-INDIAN PURCHASERS
FOR CIGARETTES SOLD ON INDIAN RESERVATIONS. REQUIRING THE
DEPARTMENT OF REVENUE TO REPORT FINDINGS CONCERNING NEGOTIATIONS TO THE INTERIM
HOUSE BILL NO. 1012 COMMITTEE ON INDIAN AFFAIRS.

INTRODUCED BY ELLIOTT

BY REQUEST OF THE HOUSE TAXATION COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT TO APPLY ~~APPLYING THE~~
~~CIGARETTE SALES TAX TO ALL USE AND CONSUMPTION OF CIGARETTES~~
~~ON AN INDIAN RESERVATION EXCEPT BY MEMBERS OF AN INDIAN~~
~~TRIBES ON AN INDIAN RESERVATION, PROVIDING FOR A REFUND OF OR~~
~~CREDIT FOR TAXES PAID ON CIGARETTES SOLD TO TRIBAL MEMBERS;~~
~~PROVIDING AN INCREASE IN THE APPROPRIATION TO THE DEPARTMENT~~
~~OF REVENUE FOR FISCAL YEARS 1992 AND 1993 TO ADMINISTER~~
~~COLLECTION OF CIGARETTE TAXES; PROVIDING A CIVIL PENALTY FOR~~
~~THE POSSESSION OF UNSTAMPED CIGARETTES, REQUIRING A REPORT~~
~~TO THE 53RD LEGISLATURE; AMENDING SECTION SECTIONS~~
~~16-11-111, 16-11-112, 16-11-118, 16-11-131, AND 16-11-133;~~
~~AND PROVIDING AN IMMEDIATE EFFECTIVE DATE, AN~~
~~APPLICABILITY DATE, AND A TERMINATION DATE."~~

WHEREAS, the Legislature proposes to eliminate unfair
competitive business advantages now enjoyed by retailers
operating on Indian reservations in direct competition with
businesses operated off the reservations by requiring that
cigarettes sold to non-Indian purchasers on an Indian
reservation have a Montana cigarette tax stamp affixed even
if sold by an Indian retailer; and

WHEREAS, the Legislature also recognizes that Indian
tribes in Montana also view certain state taxes being
assessed against the tribes and tribal members on the
reservation, including fuel and alcohol taxes, as being
unlawful; and

WHEREAS, although the Legislature proposes to exercise
its constitutional authority to seek assistance from tribal
authorities in collecting cigarette taxes from non-Indians
on the reservations, it also recognizes the need for
discussion and negotiation with Indian tribes in Montana to
avoid dual taxation and to develop a comprehensive
resolution of all reservation taxation issues affecting both
the state and the tribes.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Definitions. As used in
[sections 1 through 3], the following definitions apply:

(1) "Indian reservation" means Indian lands federally
declared to be a reservation for an Indian tribe by treaty
between the tribe and any territorial government or state
government or the United States government or established by
acts of the United States congress or by formal decision of
the executive branch of the United States.

(2) "Indian retailer" means a business or enterprise
that is wholly owned and operated by an Indian tribe in

Montana or a business or enterprise that is wholly owned and operated by one or more members of a tribe in Montana on whose reservation the business or enterprise is located.

NEW SECTION. SECTION 2. STAMPS AFFIXED ON ALL CIGARETTES -- EXCEPTION. EXCEPT FOR CIGARETTES SOLD ON MILITARY RESERVATIONS, ALL CIGARETTES SOLD IN MONTANA MUST HAVE A MONTANA CIGARETTE TAX STAMP AFFIXED PRIOR TO SALE.

Section 3. Section 16-11-111, MCA, is amended to read:

"16-11-111. Cigarette sales tax -- **EXEMPTION FOR SALES TO INDIANS.** There--is--hereby (1) A tax on the purchase of cigarettes for consumption, use, or any purpose other than resale in the regular course of business is levied, imposed, and assessed at the following rate and there shall must be collected precollected by the wholesaler and paid to the state of Montana upon cigarettes sold or possessed in this state the following excise tax which shall be paid prior to the time of sale and delivery of cigarettes: 18 cents on each package containing 20 cigarettes and, when packages contain more or less than 20 cigarettes, then a tax on each cigarette equal to 1/20th the tax on a package containing 20 cigarettes.

(2) The tax imposed by this section does not apply to cigarettes sold by an Indian retailer to members of a federally recognized Indian tribe within the boundaries of the tribe's reservation located in Montana.

(3) The tax imposed by this section must be precollected, subject to refund or credit as provided in subsection (4), on all cigarettes entering Montana Indian reservations.

(4) Wholesalers PURSUANT TO THE PROCEDURE PROVIDED IN SUBSECTION (5), WHOLESALERS making sales of cigarettes to Indian retailers may apply to the department for a refund or credit for taxes precollected on cigarettes sold by the retailers to members of an Indian tribe on whose reservation the retail sale is made. The claim for credit or refund must be made on the wholesaler's cigarette tax return for the reporting period immediately following the period during which the cigarettes were sold by the wholesaler to the retailer. If not claimed, the credit or refund is lost.

(5) THE DISTRIBUTION OF TAX-FREE CIGARETTES TO INDIANS MUST BE IMPLEMENTED THROUGH A SYSTEM OF PREAPPROVED WHOLESALER SHIPMENTS. LICENSED MONTANA WHOLESALERS SHALL CONTACT THE DEPARTMENT FOR APPROVAL PRIOR TO SHIPMENT OF TAXED CIGARETTES. THE DEPARTMENT MAY AUTHORIZE SALES BASED ON WHETHER THE QUOTA FOR THAT PARTICULAR SERVICE AREA HAS BEEN MET. IF THE SALE IS AUTHORIZED AS TAX EXEMPT, THE WHOLESALER, UPON PROVIDING PROOF OF ORDER AND DELIVERY TO EXEMPT RETAILER, MUST BE PROVIDED A CREDIT OR A REFUND ON THE ALLOCATION FOR THE PARTICULAR SERVICE AREA HAS BEEN FILLED, THE DEPARTMENT SHALL IMMEDIATELY NOTIFY THE

1 ~~WHOLESALESA~~ THAT ALL FURTHER SALES ON THAT RESERVATION MUST
 2 ~~BE TAXED AND THAT CLAIMS FOR REFUND OR CREDIT WILL NOT BE~~
 3 ~~HONORED FOR THE REMAINDER OF THE MONTH. ALLOCATIONS ARE NOT~~
 4 ~~TRANSFERABLE BETWEEN MONTHS OR BETWEEN INDIAN RESERVATIONS.~~

5 ~~(5)(6) The total amount of refunds or credits allowed~~
 6 ~~by the department to all wholesalers claiming the refund or~~
 7 ~~credit under subsection (4) for any reporting--period MONTH~~
 8 ~~may not exceed an amount that is equal to the tax due on the~~
 9 ~~average individual consumption of cigarettes--determined-in~~
 10 ~~a-manner-provided-by--department--rule; multiplied by the~~
 11 ~~tribal member population of the reservation on which the~~
 12 ~~sales are made. THE DEPARTMENT SHALL DETERMINE THE AMOUNT OF~~
 13 ~~REFUNDS OR CREDITS FOR EACH INDIAN RESERVATION AT THE~~
 14 ~~BEGINNING OF EACH FISCAL YEAR, USING POPULATION ESTIMATES~~
 15 ~~AND OTHER DATA ISSUED BY THE UNITED STATES GOVERNMENT. If~~
 16 ~~the--total--amount-of--refunds--claimed--by--wholesalers--exceeds~~
 17 ~~the--amount--computed--the--claims--by--the--wholesalers--must--be~~
 18 ~~reduced---proportionally---based--on--the--total--amount--of~~
 19 ~~on-reservation-business-conducted-by-each-wholesaler-to--the~~
 20 ~~amounts--necessary-to-make-the-total-of-all-the-claims-equal~~
 21 ~~to-the-allowable-maximum;~~

22 ~~(6)(7) A refund or credit may not be allowed to a~~
 23 ~~wholesaler unless the wholesaler certifies to the department~~
 24 ~~PURSUANT TO 16-11-132(2) that the economic benefit of the~~
 25 ~~credit or refund has been passed on to the Indian retailers~~

1 ~~to whom the sales were made."~~

2 ~~NEW SECTION. SECTION 4. CIVIL PENALTY FOR POSSESSION~~
 3 ~~OF UNSTAMPED CIGARETTES. IN LIEU OF THE CRIMINAL PENALTIES~~
 4 ~~PROVIDED IN TITLE 16, CHAPTER 11, PART 1, THE DEPARTMENT MAY~~
 5 ~~ASSESS A PERSON POSSESSING UNSTAMPED CIGARETTES A CIVIL~~
 6 ~~PENALTY OF \$250 FOR THE FIRST FULL OR PARTIAL PACK OF~~
 7 ~~UNSTAMPED CIGARETTES AND \$10 FOR EACH ADDITIONAL FULL OR~~
 8 ~~PARTIAL PACK OF UNSTAMPED CIGARETTES.~~

9 ~~NEW SECTION. Section 5. Revenue oversight -- state and~~
 10 ~~tribal negotiations -- report to legislature. (1) The~~
 11 ~~legislature directs the department of revenue to:~~

12 ~~(a) negotiate with individual tribes within the state~~
 13 ~~on the methods of implementing [this act];~~

14 ~~(b) discuss and negotiate alternative methods for the~~
 15 ~~collection of cigarette taxes, including the possibility of~~
 16 ~~future tribal taxation, with the tribal governments of each~~
 17 ~~the Mt. tribal chairman's assoc., and the Cood~~
 18 ~~Montana reservation or their designated representatives,~~
 19 ~~or Indian affairs~~

18 ~~(c) discuss and negotiate with individual Indian tribe~~
 19 ~~in Montana the possibility of resolving other state taxatio~~
 20 ~~issues, including but not limited to the imposition of fue~~
 21 ~~and alcohol taxes on Indian reservations, throug~~
 22 ~~state-tribal cooperative agreements; and~~

23 ~~(d) report its findings ^{on} the collection of cigaret~~
 24 ~~taxes pursuant to 16-11-111 and on negotiations with trib~~
 25 ~~authorities on a comprehensive state-tribal taxati~~

mechanism to prevent dual taxation by the state and a tribal government that has adopted an ordinance imposing a cigarette tax that is identical to that imposed by the state.

1 agreement or proposed legislation to the interim committee
2 on Indian affairs prior to the 53rd legislative session.

3 (2) The legislature also directs the interim committee
4 on Indian affairs to work with the Montana tribal chairman's
5 association, the state coordinator of Indian affairs, and
6 individual tribes to:

7 (a) monitor tax collection *made pursuant to 16-11-111, cigarette*
8 (b) consider alternatives for cigarette tax collection,
9 including possible cooperative agreements to avoid dual
10 taxation by state and tribal governments;

11 *id* identify other unresolved taxation issues,
12 including but not limited to the imposition of fuel and
13 alcohol taxes on Indian reservations, between the state and
14 Montana Indian tribes; and

15 (c) propose legislation to the 53rd legislature that
16 would facilitate a cooperative government-to-government
17 resolution of all Indian reservation taxation issues.

18 **SECTION 6. SECTION 16-11-113, MCA, IS AMENDED TO READ:**

19 "16-11-113. Tax insignia. (1) Within 72 hours after
20 receipt by the distributor or dealer of any cigarettes,
21 except as hereinafter provided, he shall cause to be
22 securely affixed thereto the required insignia denoting the
23 tax thereon. ~~A person specifically exempted under the~~
24 ~~provisions of 16-11-113(2) may not be considered to be~~
25 ~~acting unlawfully under this section.~~

1 (2) Said insignia shall be properly canceled prior to
2 sale or removal for consumption, under such regulations as
3 the department may prescribe.

4 (3) Each package shall have the required insignia to
5 affix thereto in such a manner that the insignia will be
6 destroyed when the package is opened.

7 (4) Wholesalers and retailers licensed under this part
8 may buy, sell, or have in their possession only cigarettes
9 which have the insignia provided for in this part on each
10 package. The insignia provided for in this part shall be
11 sold to and affixed by licensed wholesalers and licensed
12 retailers only.

13 (5) Whenever any cigarettes are found in the place of
14 business of any unlicensed wholesaler, retailer, or other
15 person without the insignia affixed and canceled or not
16 marked as having been received by the unlicensed wholesaler,
17 retailer, or person within the preceding 72 hours, the
18 presumption shall be that such cigarettes are kept therein
19 in violation of the provisions of this part."

20 **SECTION 7. SECTION 16-11-119, MCA, IS AMENDED TO READ:**

21 "16-11-119. Disposition of taxes -- retirement of
22 bonds. All (1) Except as provided in subsection (2), all
23 moneys collected under the provisions of 16-11-111, less the
24 expense of collecting all the taxes levied, imposed, and
25 assessed by said section, shall be paid to the state

1 treasurer and deposited as follows: 70.89% in the long-range
2 building program fund in the debt service fund type and
3 29.11% in the long-range building program fund in the
4 capital projects fund type.

5 (2) The following money, collected pursuant to
6 16-11-111, is appropriated to the department:

7 Fiscal year 1992	\$64,272
8 Fiscal year 1993	56,872"

9 **SECTION 8. SECTION 16-11-131, MCA, IS AMENDED TO READ:**

10 "16-11-131. Transporting cigarettes without insignia a
11 misdemeanor. It shall be unlawful for any person to
12 transport into, receive, carry, or move from place to place
13 within this state, except in the course of interstate
14 commerce, any cigarettes which do not bear the insignia
15 required by this part, ~~except for a person specifically~~
16 ~~exempted in 16-11-132(2).~~ Any person violating the
17 provisions of this section is guilty of a misdemeanor and
18 shall be punished as hereinafter provided."

19 **SECTION 9. SECTION 16-11-133, MCA, IS AMENDED TO READ:**

20 "16-11-133. Sale and use of cigarettes without insignia
21 unlawful. Every person who sells any package of cigarettes
22 which does not bear the insignia required by this part and
23 every person who uses or consumes a cigarette within this
24 state, taken from a package which does not bear the required
25 insignia, is guilty of a misdemeanor and shall be punished

1 as hereinafter provided, ~~except that a person specifically~~
2 ~~exempted under the provisions of 16-11-132(2) may not be~~
3 ~~considered to be acting unlawfully under this section."~~

4 **NEW SECTION. Section 10. Codification instruction.**

5 ~~{Section 1} is [SECTIONS 1, 2, AND 4] ARE~~ intended to be
6 codified as an integral part of Title 16, chapter 11, part
7 1, and the provisions of Title 16, chapter 11, part 1, apply
8 to ~~{section 1} [SECTIONS 1, 2, AND 4].~~

9 **NEW SECTION. Section 11. Effective date**

10 ~~APPLICABILITY.~~ [This act] is effective July ~~17~~ 1991 ON
11 PASSAGE AND APPROVAL AND APPLIES TO SALES MADE BY A
12 WHOLESALE AFTER JUNE 30, 1991.

13 **NEW SECTION. Section 12. Termination. [This act]**

14 terminates July 1, 1993.

-End-

SENATE STANDING COMMITTEE REPORT

Page 1 of 2
April 12, 1991

MR. PRESIDENT:

We, your committee on Taxation having had under consideration House Bill No. 1012 (third reading copy -- blue), respectfully report that House Bill No. 1012 be amended and as so amended be concurred in:

1. Title, lines 5 through 13.

Following: "APPLY"

Strike: remainder of line 5 through "CIGARETTES;" on line 13

Insert: "REQUIRING NEGOTIATIONS BETWEEN THE STATE AND TRIBAL GOVERNMENTS FOR COLLECTION OF A CIGARETTE SALES TAX FROM NON-INDIAN PURCHASERS FOR CIGARETTES SOLD ON INDIAN RESERVATIONS; REQUIRING THE DEPARTMENT OF REVENUE TO REPORT FINDINGS CONCERNING NEGOTIATIONS TO THE INTERIM COMMITTEE ON INDIAN AFFAIRS;"

2. Title, line 13.

Following: "REQUIRING"

Strike: "A REPORT"

Insert: "THE INTERIM COMMITTEE ON INDIAN AFFAIRS TO PROPOSE LEGISLATION"

3. Title, lines 14 through 17.

Following: "LEGISLATURE;" on line 14

Strike: remainder of line 14 through "HCA;" on line 16

Following: "DATE" on line 16

Strike: remainder of line 16 through "DATE," on line 17

4. Page 1, line 19 through page 6, line 8.

Strike: page 1, line 19 through page 6, line 8 in their entirety

Renumber: subsequent sections

5. Page 6, lines 12 and 13.

Following: line 11

Strike: subsection (a) in its entirety

Renumber: subsequent subsections

6. Page 6, line 17.

Following: "representatives"

Insert: ", the Montana Tribal chairman's association, and the state coordinator of Indian affairs"

7. Page 6, lines 23 and 24.

Following: "on" on line 23

Strike: remainder of line 23 through "on" on line 24

8. Page 7, line 7.

Following: "monitor"

Insert: "negotiations conducted pursuant to subsection (1)(a) for proposed cigarette"

Following: "collection"

Strike: remainder of line 7 through "16-11-111"

9. Page 7, line 11.

Following: line 10

Insert: "(c) after public hearings and consultation with tobacco wholesalers and retailers, propose legislation to the 53rd legislature to provide for collection of the cigarette sales tax from non-Indian purchasers for cigarettes sold on Indian reservations. The legislation must include a mechanism to prevent dual taxation by providing for revenue sharing between the state and a tribal government that has adopted an ordinance imposing a cigarette tax that is identical to that imposed by the state."

Renumber: subsequent subsections

10. Page 7, line 18 through page 10, line 8.

Strike: sections 6 through 10 in their entirety

Renumber: subsequent sections

11. Page 10, lines 9 and 10.

Following: "date"

Strike: "APPLICABILITY"

12. Page 10, lines 11 and 12.

Following: "APPROVAL" on line 11

Strike: remainder of line 11 through "1991" on line 12

Signed: _____

Mike Halligan, Chairman

101-4-12-91
Amd. Coord.

SB 4-12-91
Sec. of Senate